Petitioner's Brief

No. 81-430

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF ILLINOIS,

Petitioner,

vs.

LANCE GATES AND SUSAN GATES,

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

PETITIONER'S BRIEF ON REARGUMENT

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QUESTION PRESENTED

Whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Weeks* v. *United States*, 232 U.S. 383 (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

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PETITIONER'S BRIEF ON REARGUMENT

SUMMARY OF ARGUMENT

This case presents two logically separable questions. First: Whether a detailed anonymous tip that has been corroborated by a police investigation can be considered in determining whether there is probable cause to support the issuance of a search warrant. Second: Whether the evidence seized in this particular case should be suppressed.

These questions can be answered separately. That was the mode of analysis used in *Jones* v. *United States,* 362 U.S. 257 (1960). In *Jones,* this Court first held that a warrant could be based upon hearsay and then analyzed whether there was a

substantial basis for crediting the hearsay on the facts at bar. Petitioner respectfully urges this Court to follow the same approach here and decide the first general question in petitioner's favor before going on to discuss the applicability of the exclusionary rule.

With respect to the second question, petitioner submits that the evidence seized in this case should not be suppressed even if this Court believes that Judge Lewis, the judge who issued the warrant, made a mistake when he determined that there was probable cause to search respondents' residence and car for illegal drugs and drug paraphernalia. Judge Lewis' judgment as to probable cause, even if mistaken, was reasonable. It should not be overturned on a motion to suppress.

Determinations of probable cause, particularly those by a judicial officer, should not be reviewed *de novo* on motions to suppress. The proper test is whether the initial determination was a reasonable one. *See, Brinegar* v. *United States,* 338 U.S. 160 (1949). If so, the initial determination should not be disturbed, even if the court reviewing the determination on a motion to suppress disagrees with the initial judgment.

The purpose of the exclusionary rule is to deter police misconduct. *See, Michigan* v. *Tucker,* 417 U. S. 433, 447 (1974); *United States* v. *Calandra,* 414 U. S. 338 (1974). The exercise of independent judgment by police or magistrates as to practical, factual matters such as the existence of probable cause is not misconduct and should not lead to the sanction of exclusion, so long as the initial judgment was reasonable. *See, Stone* v. *Powell,* 428 U. S. 465, 538-542 (1976) (White J. dissenting; discussing a point the rest of the Court did not reach). The proper test on a motion to suppress evidence seized pursuant to a warrant, therefore, is not whether the search warrant affidavit's hypothesis necessarily follows but whether the judge or magistrate who issued the warrant could reasonably conclude that it probably follows. *See, Jones* v. *United States,* 362 U. S. 257, 271 (1960).

In the instant case, the determination that there were probably drugs or drug paraphernalia in respondents' residence and car was reasonable, even assuming *arguendo* that it was mistaken. The inference of probability was based on objective facts and circumstances and cannot be characterized as unreasonable. The motion to suppress should therefore have been denied for that reason as well as those stated in our original briefs.

I.

THIS COURT SHOULD FIRST HOLD THAT CORROBORATED, DETAILED, ANONYMOUS TIPS MAY BE CONSIDERED IN DETERMINATIONS OF PROBABLE CAUSE BEFORE DISCUSSING WHETHER THE EXCLUSIONARY RULE IS APPLICABLE IN THIS PARTICULAR CASE.

This case presents two logically separable and independent questions. The first question is whether a detailed, anonymous tip that has been corroborated by a police investigation can be considered in determining whether there is probable cause to support the issuance of a search warrant. The second question is whether the evidence seized in this particular case should be suppressed.

This Court could decide the first question in petitioner's favor and then go on to decide the second. Indeed, there is precedent for breaking down the problem in just this way. In *Jones* v. *United States,* 362 U. S. 257 (1960), this Court first analyzed the general question of whether hearsay could ever, under any circumstances, be the basis for a search warrant. After discussing *Draper* v. *United States,* 358 U. S. 307 (1959), and *Brinegar* v. *United States,* 338 U. S. 160 (1949), this Court settled the general question, holding,

> "We conclude therefore that hearsay may be the basis for a warrant." *Jones* v. *United States,* 362 U. S. 257, 271 (1960).

This Court then went on to discuss the specific question of whether the evidence seized pursuant to the particular search warrant at bar should be suppressed. This Court settled the separate, particular question by holding,

> "We cannot say that there was so little basis for accepting the hearsay *here* that the Commissioner acted improperly." *Id.* at 271. (Emphasis added)

Petitioner respectfully urges this Court to follow the same analytic approach in the instant case. Petitioner respectfully requests this Court to hold, for the reasons set forth in petitioner's original briefs, that detailed, corroborated, anonymous tips may sometimes provide a basis for a search warrant before going on to discuss the applicability of the exclusionary rule to the facts of this particular case.

II.

EVIDENCE SEIZED PURSUANT TO THE SEARCH WARRANT SHOULD BE ADMISSIBLE EVEN IF JUDGE LEWIS MADE A MISTAKE IN HIS DETERMINATION OF PROBABLE CAUSE BECAUSE THERE WAS A REASONABLE BASIS FOR CONCLUDING THAT PROBABLE CAUSE EXISTED.

The remaining issue in this case is whether the evidence discovered in respondents' car and residence and seized pursuant to the search warrant issued by Associate Judge S.K. Lewis on May 6, 1978 should be suppressed. Petitioner has already argued that suppression is improper because Judge Lewis' initial determination of probable cause was correct[1] and

[1] The Warrant Clause of the Fourth Amendment requires only three things: that warrants be issued by neutral, disinterested judicial officers, that warrants be based upon probable cause, and that warrants particularly describe the place to be searched and the person or things to be seized. *See, Dalia v. United States*, 441 U. S. 238, 255-256 (1979). In this case, respondents have not challenged the neutrality of the judge who issued the warrant or the particularity of the warrant. The only disputed issues are whether the warrant satisfied the Fourth Amendment's requirement of probable cause and whether the exclusionary rule should apply.

should not be overturned even if the question of probable cause were considered *de novo.* Petitioner now submits that, assuming *arguendo,* Judge Lewis made a mistake in his determination of probable cause, the evidence seized pursuant to the warrant should nevertheless be admissible. Judge Lewis' assessment of the probabilities, even if mistaken, was a reasonable one. The police, therefore, had reasonable grounds to believe that their conduct was consistent with the Fourth Amendment, and, in particular, with the Fourth Amendment's requirement of probable cause. In these circumstances, application of the exclusionary rule is improper.

A. Although the Exclusionary Rule Was Intended to Sanction and Deter Police Misconduct, the Rule Has Been Invoked in Cases in Which There Was No Police Misconduct.

As the facts of the present case attest, the exclusionary rule has overshot its mark. The rule was originally intended to deter "official lawlessness in flagrant abuse" of Fourth Amendment rights. *Mapp* v. *Ohio,* 367 U. S. 643, 655 (1961). The theory was that the sanction of exclusion was necessary as "an effective deterrent to illegal police action." *Linkletter* v. *Walker,* 381 U. S. 618, 636-637 (1965). Without the sanction of exclusion, it was felt, "the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold." *Mapp* v. *Ohio,* 367 U. S. 643, 657 (1961). That the criminal should go free was unfortunate, but it would be far worse for courts "to declare that the Government may commit crimes in order to secure the conviction of a private criminal . . . ." *Elkins* v. *United States,* 364 U. S. 206, 223 (1960), quoting from *Olmstead* v. *United States,* 277 U. S. 438, 485 (1928) (Brandeis J. dissenting). Courts should not receive evidence procured through the "dirty business" of police crime, *Olmstead* v. *United States, supra.* 277 U. S. at 470 (Holmes J. dissenting), lest they become "accomplices in the willfull disobedience of a Constitution they are sworn to uphold." *Elkins* v. *United States,* 364 U. S. 206, 223 (1960).

This was the original theory of the exclusionary rule.[2] But in recent years the rule has been applied in cases in which there was no police misconduct and where the police behaved reasonably in all respects. Evidence has been suppressed simply because the police, or the magistrate upon whom they relied, made a reasonable judgment as to some factual, practical matter, such as the existence of probable cause, with which the court subsequently reviewing their conduct disagreed.

The present case is illustrative. It is very hard to see what the police did wrong here. After receiving the anonymous letter, they conducted an extensive investigation which corroborated the letter and uncovered additional indicia of criminal activity. The police then presented the results of their investiga-

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[2] Even on these terms the exclusionary rule has been subject to cogent criticism. As noted in *Irvine* v. *California*, 347 U. S. 128, 136 (1954) (plurality opinion), prior to the imposition of the exclusionary rule upon the States, "There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it."

The opinion goes on: "That the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of right by the police. The case is made, so far as the police are concerned, when they announce that they have arrested their man. Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches. The disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best." *Id.* at 136-137.

Others have also criticized the notion that, "The criminal is to go free because the constable has blundered." *People* v. *Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926) (Cardozo J.). *See e.g.*, 8 Wigmore Evidence (3d ed. 1940), § 2184.

tion to Judge Lewis who made an independent determination of probable cause which was certainly within the bounds of reason. The police had every right to expect that they could rely upon the warrant he issued. Yet the evidence seized pursuant to the warrant was suppressed and, unless this Court reverses the judgment below, the State will have no case against respondents.

Unfortunately, the instant case is by no means unusual. In *People* v. *Palanza,* 55 Ill. App. 3d 1028, 371 N. E. 2d 687 (3d Dist. 1978), for example, a search warrant affidavit said that the affiant was told by an informant of proven reliability (with specific instances of past accurate information then described) that the informant saw in certain described premises "a quantity of a white crystalline substance which was represented to the informant by a white male occupant of the premises to be cocaine. Informant has observed cocaine on numerous occasions in the past and is thoroughly familiar with its appearance. The informant states that the white crystalline powder he observed in the above described premises appeared to him to be cocaine." 371 N. E. 2d at 688. This warrant was invalidated under the *Aguilar* basis of knowledge prong because the affidavit did not show that the substance observed was in fact cocaine.[3]

In *People* v. *Davenport,* 19 Ill. App. 3d 426, 311 N. E. 2d 751 (5th Dist. 1974), a search warrant affidavit said that the defendant's neighbor, a reliable and reputable person, told the affiant that he saw the defendant receive a large bag of a substance suspected to be cannabis and thereafter dispense the substance to a large number of persons who entered the defendant's house surreptitiously at night, most of whom

[3] *See also, People* v. *Brethauer,* 174 Colo. 29, 482 P. 2d 369 (1971) (Warrant invalidated under *Aguilar* even though informant brought back samples of defendant's LSD and had them analyzed in a laboratory).

entered by the back door after parking their cars some distance away and then crossing an adjoining property. A deputy sheriff added that he observed the same traffic to and from the house. This warrant was held invalid under both prongs of *Aguilar* because the affidavit contained no proof that the neighbor was a credible person or that he knew the substance was really cannabis.[4]

This overly critical approach is not confined to drug cases nor to Illinois. In *Bridger* v. *State,* Tex. Crim. App., 503 S. W. 2d 801 (1974), the admitted accomplice of an armed robber told the affiant that the gun used in the robbery was hidden in the armed robber's apartment. This warrant was invalidated because it did not recite how the accomplice knew the gun was there.[5]

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[4] In *People* v. *Pelton,* 27 Ill. App. 3d 781, 327 N. E. 2d 360 (3d Dist. 1975), the search warrant affidavit recited that a reliable informant told the affiant police officer that he had purchased marijuana from the defendant. This was held invalid under *Aguilar* because there was no proof that the informant was reliable. The informant's statement that he had purchased marijuana from the defendant was not considered an adequate admission against penal interest. The Court noted that *possession* of marijuana was the crime but that, according to the affidavit, the informant only admitted *purchasing* the marijuana.

In *People* v. *Lindner,* 24 Ill. App. 3d 995, 322 N. E. 2d 229 (2nd Dist. 1975), a named informant told the affiant that he saw the defendant receive 28,000 capsules of seconal and place them in an attache case in the defendant's bedroom. The evidence here was suppressed because the affidavit failed to show that the informant was a credible person or how he knew there were really 28,000 capsules.

See also, People v. *Peschong,* 181 Colo. 29, 506 P. 2d 1232 (1973) (Statement that informant had given affiant reliable information on at least 3 prior occasions plus corroboration of tip through officer's personal observations did not satisfy *Aguilar* veracity prong).

[5] In *People* v. *Nash,* 110 Mich. App. 428, 313 N. W. 2d 307 (1981), the defendant's landlord discovered a box with a strange odor in the defendant's trailer while showing the trailer to prospective new tenants. The landlord removed the box from the trailer and told

(Footnote continued on following page)

In *People* v. *Vanco,* 55 Ill. App. 3d 151, 371 N. E. 2d 82 (2d Dist. 1977), two separate informants with past records of proven reliability independently reported that the defendant had participated in a burglary and that the stolen items were in the defendant's home. The evidence in this case was suppressed because the warrant failed to satisfy the *Aguilar* basis of knowledge prong.

In *Lowery* v. *State,* Tex. Crim. App., 499 S. W. 2d 160 (1973), the defendant shot an employee of a vending machine company in the back while robbing the company office. An informant told the police that the defendant committed the crimes. An eyewitness to the robbery then positively identified a picture of the defendant as the person who had committed the murder. Police arrested the defendant and found the murder weapon. The defendant's subsequent conviction for murder and armed robbery was reversed on appeal, however, because the affidavit supporting the defendant's arrest warrant was defective under *Aguilar.* The affidavit recited the informant's tip and the photo identification but failed, *inter alia,* to "provide the necessary information that the identification was made in the affiant's presence. . . ." *Id.* at 163.

(Footnote continued from preceding page)

his wife, who opened it the next day. She discovered the corpse of the defendant's husband. The police were summoned. Upon arrival, the police reopened the box. Defendant's conviction for murder was reversed because the box was within the curtilage of the trailer when the police reopened it without a warrant. The corpse was ordered suppressed.

In *Commonwealth* v. *Sheppard,* 387 Mass. 488, 441 N. E. 2d 725 (1982), the Supreme Judicial Court of Massachusetts felt compelled by the decisions of this Court to reverse a first degree murder conviction because the police, due to the unavailability of proper forms on a Sunday, used a pre-printed search warrant form intended for drug seizures that listed items other than those listed in the search warrant affidavit and because the police, in their haste, neglected to staple the affidavit to the warrant or otherwise incorporate it by reference.

There is plainly something wrong with the application of the exclusionary rule in these cases.[6] "It is one thing to condemn the product of an arrogant defiance of the Constitution; it is another to impose the sanction when the official intends to respect his oath of office but is found to be mistaken, let us say, by the margin of a single vote." *Eleuteri* v. *Richman,* 26 N. J. 506, 514, 141 A. 2d 46, 51 (1958). "The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice." *Stone* v. *Powell,* 428 U. S. 465, 490 (1976).

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[6] Members of this Court have repeatedly urged a general reconsideration of the exclusionary rule and the situations in which it is applied. *See e.g., Robbins* v. *California,* 453 U. S. 420, 437, 443-444 (1981) (Rehnquist, J., dissenting); *California* v. *Minjares,* 443 U. S. 916, 917 (1979) (Rehnquist, J., dissenting from denial of stay); *United States* v. *Ceccolini,* 435 U. S. 268, 283 (1978) (Burger, C. J., concurring); *Brewer* v. *Williams,* 430 U. S. 387, 413-414 n. 2 (1977) (Powell, J., concurring); *Stone* v. *Powell,* 428 U. S. 465, 496 (1976) (Burger, C. J., concurring); *Coolidge* v. *New Hampshire,* 403 U. S. 443, 490 (1971) (Harlan, J., concurring); *id.* at 502 (Black, J., dissenting); *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U. S. 388, 415 (1971) (Burger, C. J., dissenting).

Numerous commentators have also criticized the exclusionary rule. *See e.g.,* M. Wilkey, *The Exclusionary Rule: Costs and Viable Alternatives,* 2 Criminal Justice Ethics 16 (1982); H. Friendly, *Benchmarks* 261 (1967); C. Wright, *Must the Criminal Go Free if the Constable Blunders?,* 50 Tex L. Rev. 736, 744-745 (1972); American Law Institute's Model Code of Pre-Arraignment Procedure § SS 290.2(2) (1975); W. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule,* 69 Geo. L. J. 1361, 1423 (1981); F. Carrington, *Good Faith Mistakes and the Exclusionary Rule,* 2 Criminal Justice Ethics 35, 37-38 (1982); E. Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule,* 69 J. Crim. L. & Criminology 635, 650 (1978); J. Kaplan, *The Limits of the Exclusionary Rule,* 26 Stan. L. Rev. 1027, 1044 (1974); M. Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?,* 62 Judicature 215 (1978).

B. Reasonable Determinations of Probable Cause Should Not Be Overturned on Motions to Suppress

To correct this injustice, at least in the area of probable cause and similar factual, practical questions, courts considering motions to suppress should not substitute their judgment for the judgment of those charged with making the decision in the first instance. Reasonable determinations of probable cause, particularly those by judicial officers, should not be overturned on motions to suppress just because the reviewing judge believes that the initial determination was mistaken.

The exclusionary "rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States* v. *Calandra,* 414 U. S. 338, 348 (1974).[7] The sole Fourth Amendment injury lies in the original invasion of privacy. "That wrong . . . is fully accomplished by the original search without probable cause." *Id.* at 354. The subsequent use of the evidence works no new Fourth Amendment wrong. Whether it should be prescribed presents a question of remedies, not rights, and depends on whether suppression is necessary to deter future Fourth Amendment violations. *See id.* at 354. In other words, "The rule is calculated to prevent, not to repair." *Elkins* v. *United States,* 364 U. S. 206, 217 (1960). Its emphasis is forward.

Accordingly, the exclusionary rule should not be invoked simply because the court reviewing the case believes that it was a mistake to authorize the search in the first place. By the time of the motion to suppress "the ruptured privacy of the victims'

[7] It is now well settled that the exclusionary rule is not coextensive with the Fourth Amendment. *See e. g., United States* v. *Calandra,* 414 U. S. 338 (1974); *United States* v. *Peltier,* 422 U. S. 531 (1975); *United States* v. *Janis,* 428 U. S. 433 (1976); *Stone* v. *Powell,* 428 U. S. 465 (1976).

homes and effects cannot be restored. Reparation comes too late." *Linkletter* v. *Walker,* 381 U. S. 618, 637 (1965). At this point, the proper inquiry is whether the police have engaged in the sort of conduct that they can and should be deterred from doing in the future.

With this question in mind, the fallacy of the decisions in *Palanza, Davenport, Pelton, Lowery* and the instant case becomes apparent. The police in these cases did nothing wrong. At the worst they relied upon a magistrate or judge who made a reasonable determination of probable cause with which the reviewing court subsequently disagreed. This is not misconduct. It is not dirty business. It is not the sort of police behavior that the Fourth Amendment was intended to prohibit or the exclusionary rule designed to deter. Rather, it is the inevitable concomitant of a system of justice administered by human beings and can be avoided only if the police stop doing their job.

Police officers must exercise independent judgment in ambiguous situations every day. It is part of their job. "An officer sworn to uphold the law and to apprehend those who break it inevitably must make judgments regarding probable cause to arrest. Is there reasonable ground to believe that a crime has been committed and that a particular suspect has committed it? Sometimes the historical facts are disputed or are otherwise in doubt. In other situations the facts may be clear so far as they are known, yet the question of probable cause remains. In still others, there are special worries about the reliability of secondhand information such as that coming from informants." *Stone* v. *Powell,* 428 U.S. 465, 538 (1976) (White J. dissenting; discussing a point the rest of the Court did not reach).

These decisions are difficult as they require the exercise of judgment in the face of uncertainty and cannot be answered through any mechanical rule. "Informants' tips, like all other clues and evidence coming to a policeman on the scene, may

vary greatly in their value and reliability. One simple rule will not cover every situation." *Adams* v. *Williams,* 407 U. S. 143, 147 (1972). "The troublesome line . . . between mere suspicion and probable cause . . . necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances." *Brinegar* v. *United States,* 338 U. S. 160, 176 (1949).

Yet despite the uncertainties, police officers must decide and act. "In any of these situations, which occur repeatedly, when the officer is convinced that he has probable cause to arrest he will very likely make the arrest. . . . Making the arrest in such circumstances is precisely what the community expects the police officer to do. Neither officers nor judges issuing arrest warrants need delay apprehension of the suspect until unquestioned proof against him has accumulated. The officer may be shirking his duty if he does so." *Stone* v. *Powell,* 428 U. S. 465, 538-539 (1976) (White J. dissenting; discussing a point that the rest of the Court did not reach).

Inevitably, the exercise of independent judgment by police officers or by the judicial officers upon whom they rely will sometimes lead them to conclusions with which other reasonable people, including reviewing judges, disagree. "In most of these situations, it is hoped that the officer's judgment will be correct; but experience tells us that there will be those occasions where the trial or appellate court will disagree on the issue of probable cause, no matter how reasonable the grounds for arrest appeared to the officer and though reasonable men could easily differ on the question." *Id.* at 539.

It may be, in such instances, that the police officer made a mistake, at least in the mind of the judge who is reviewing his conduct. But, so long as the officer's or magistrate's error was a reasonable one, the exclusionary rule should not be applied. "In these situations, and perhaps many others, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that in each of

them the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence, can in no way affect his future conduct unless it is to make him less willing to do his duty. It is true that in such cases the courts have ultimately determined that in their view the officer was mistaken; but it is also true that in making constitutional judgments under the general language used in some parts of our Constitution, including the Fourth Amendment, there is much room for disagreement among judges, each of whom is convinced that both he and his colleagues are reasonable men. Surely when this Court divides five to four on issues of probable cause, it is not tenable to conclude that the officer was at fault or acted unreasonably in making the arrest." *Id.* at 539-540.

In these circumstances, it is senseless to apply the exclusionary rule. "When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted." *Id.* at 540.

The judicial integrity rationale for the exclusionary rule is inapplicable in these circumstances for the same reason that the deterrence rationale is inapplicable. "The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the Court. The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is

essentially the same as the inquiry into whether the exclusion would serve a deterrent purpose." *United States* v. *Janis,* 428 U. S. 433, 458-459 n. 35 (1976) (citation omitted). Therefore, the analysis showing that suppression cannot deter reasonable errors of judgment by police or the judicial officers upon whom they rely, shows, by the same reasoning, that suppression is not necessary to preserve judicial integrity. Indeed, suppression in such circumstances "may well have the opposite effect of generating disrespect for the law and administration of justice." *Stone* v. *Powell,* 428 U. S. 465, 491 (1976).

It follows that the exclusionary rule should not be used to overturn reasonable, although mistaken, determinations of probable cause, or similar reasonable, factual, practical judgments. "Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic." *Michigan* v. *Tucker,* 417 U. S. 433, 446 (1974). "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Brinegar* v. *United States,* 338 U. S. 160, 176 (1949).

To accomodate these concerns, Justice White proposed, in his dissenting opinion in *Stone* v. *Powell supra.,* that the exclusionary rule be modified so as not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure was consistent with the Fourth Amendment. Justice White concluded,

> If the defendant in criminal cases may not recover for a mistaken but good-faith invasion of his privacy, it makes even less sense to exclude the evidence solely on his behalf. He is not at all recompensed for the invasion by merely

getting his property back. It is often contraband and stolen property to which he is not entitled in any event. He has been charged with crime and is seeking to have probative evidence against him excluded, although often it is the instrumentality of the crime. There is very little equity in the defendant's side in these circumstances. The exclusionary rule, a judicial construct, seriously shortchanges the public interest as presently applied. I would modify it accordingly. *Id.* at 541-542.

C. Reasonable Determinations of Probable Cause Were Not Overturned on Motions to Suppress Under the Carroll-Brinegar-Jones Standard

There is another, perhaps simpler, way to reach the same result and prevent the erroneous application of the exclusionary rule in this case and the others like it. This Court could condemn the hypertechnical interpretation of the Fourth Amendment which led to these decisions and return to the reasonable and workable rule that prevailed prior to the *Aguilar-Spinelli* formulation. In short, this Court could settle the now troubled area of hearsay and probable cause.

The problem of hearsay and probable cause may be traced to the probable cause standard's mixed origins. The standard has two parents: the common law of arrests and the common law of search warrants. *See generally,* T. Taylor, *Two Studies in Constitutional Interpretation,* 19-50 (1969).

In the area of arrests and other warrantless seizures, at common law, probable cause meant "circumstances which warrant suspicion." *Locke* v. *United States,* 11 U. S. (7 Cranch) 339, 348 (1813). There was authority that these circumstances could consist entirely of the conclusory accusation of some third party previously unknown to the officer. *See, Samuel* v. *Payne,* 1 Doug. 359 (K. B. 1780).[8]

[8] "How are felons in general taken up? From descriptions of them circulated in handbills." *Ledwith* v. *Catchpole,* Cald. 291, 293-295 (K.B. 1783) (Lord Mansfield). *See generally,* Hall, *Legal and Social Aspects of Arrest Without a Warrant,* 49 Harv. L. Rev. 566 (1936).

Search warrants, by contrast, were governed by a different set of rules. Because search warrants were disfavored at common law, they were held to a strict standard of common law pleading. There was considerable authority that search warrant affidavits could include only facts and circumstances within the personal knowledge of the affiant and could not include information reported to the affiant by others. *See, e.g., Lippman* v. *The People,* 175 Ill. 101 (1898); *United States* v. *Tureaud,* 20 F. 621 (E. D. La. 1884).

The merger of these doctrines into the modern probable cause standard altered both. The standard of proof for arrests became higher; probable cause came to mean probable cause of guilt and not mere suspicion. The mode of proof for search warrants became more relaxed. But two competing principles, one drawn from each parent, remained.

On the one hand, there is the principle that probable cause is a common sense test designed to guide police officers in their daily work and is ill-suited for rules of evidence devised for the control of trials by jury. As this Court said in *Brinegar* v. *United States,* 338 U. S. 160, 175 (1949), in explaining why evidence incompetent at trial could be considered in a determination of probable cause, "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved."

On the other hand, there is the principle that, absent exigent circumstances, a conclusory accusation of guilt, standing alone, is insufficient in itself to establish probable cause, even if the accusation is made by a person who has always told the truth in the past. "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough." *Nathanson* v. *United States,* 290 U. S. 41, 47 (1933).

The traditional compromise between these two principles was to establish a per se rule against determinations of probable cause based solely upon a conclusory accusation (absent exigent circumstances), while deciding all other cases under the common sense approach—with the informant's tip being given such weight as was reasonable in the circumstances.

Thus, as this Court explained in *Carroll* v. *United States,* 267 U. S. 132 (1925), an arrest for a felony is lawful if the officer "suspects one [a felony] on his own knowledge of the facts, *or on facts communicated to him by others,* and thereupon he has *reasonable ground to believe* that the accused has been guilty of felony . . . ." *Id.* at 161 quoting from *Commonwealth* v. *Carey,* 12 Cush. 246, 251 (1851) (emphasis added). Two leading state court jurists, Justice Walter Schaefer and Justice Roger Traynor, speaking for their respective courts, later put the rule more fully, "Although information provided by an anonymous informer is relevant on the issue of reasonable cause, in the absence of some pressing emergency, an arrest may not be based solely on such information and evidence must be presented to the court that would justify the conclusion that reliance on the information was reasonable. In some cases the identity of, or past experience with, the informer may provide such evidence, and in others it may be supplied by similar information from other sources or by the personal observations of the police." *People* v. *Parren,* 24 Ill. 2d 572, 576-577, 182 N. E. 2d 662, 664-665 (1962) (Schaeffer J.); *Willson* v. *Superior Court,* 46 Cal. 2d 291, 294 P. 2d 36, 38 (1956) (Traynor J.). (citations omitted)

This compromise prevented courts from becoming rubber stamps for police officers and their informants, while at the same time preserving the practical, nontechnical conception of probable cause that police officers could understand and obey. As discussed in petitioner's opening brief, this Court's decisions in *Husty* v. *United States,* 282 U. S. 694 (1931); *Draper* v. *United States,* 358 U. S. 307 (1959); *Jones* v. *United States,*

362 U. S. 257 (1960), *Jaben* v. *United States*, 381 U. S. 214 (1965); *Chambers* v. *Maroney*, 399 U. S. 42 (1970), and *Adams* v. *Williams*, 407 U. S. 143 (1972), are all consistent with this standard as is the result, but not the sweeping dicta, of *Aguilar* v. *Texas*, 378 U. S. 108 (1964). The traditional test is and was a workable approach. As the erroneous decisions in such cases as *Palanza, Davenport, Pelton* and the instant case demonstrate, it should never have been replaced with the *Aguilar-Spinelli* formulation. That formulation has, unfortunately, returned the law of search warrants to the rules of common law pleading.

D. Cases Decided Under the Proposed Modification of the Exclusionary Rule Are Similar in Analysis and Result to Cases Decided Under the Traditional Carroll-Brinegar-Jones Standard

As a practical matter it may not make much difference, at least in the area of probable cause, whether this Court adopts the modification of the exclusionary rule proposed by Justice White or decides this case on the basis of the traditional *Carroll-Brinegar-Jones* standard of probable cause. Cases following the proposed modification and cases decided on the basis of the traditional standard are remarkably similar in analysis and result.

In *United States* v. *Williams*, 622 F. 2d 830 (5th Cir. 1980) (*en banc*), the United States Court of Appeals for the Fifth Circuit adopted the reasonable good faith exception to the exclusionary rule in a probable cause case. The facts of *Williams* illustrate the practical application of the test. In *Williams*, a federal agent saw a woman in the Atlanta International Airport whom he knew was out on bail pending appeal and under a court order requiring that she remain in Ohio. The agent arrested the woman for violation of the travel restriction then searched her incident to arrest. The search uncovered a packet of heroin.

The defendant moved to suppress the heroin on the ground that the arrest was unlawful. She argued that violation of the travel restriction was punishable as contempt of court but was not a felony, hence there was no probable cause to arrest. The District Court agreed and granted the motion. On appeal, a divided panel of the Fifth Circuit affirmed. The Fifth Circuit then reheard the appeal *en banc* and reversed the District Court.

All 24 of the judges held that the arrest was lawful because violation of the court order was a felony under 18 U. S. C. § 401(3), as the agent had assumed, and not merely contempt of court.[9] Thirteen of the 24 went on to hold that the exclusionary rule was inapplicable, in any event, because the officer's judgment as to the existence of probable cause was a reasonable one, even if it had been mistaken. Courts could expound on the meaning of 18 U. S. C. § 401(3) in criminal cases brought under that statute. There was no need to do so in suppression hearings in heroin prosecutions. *Cf. Michigan* v. *DeFillippo,* 443 U. S. 31 (1979). The agent had acted reasonably in assessing the probabilities of guilt before making the arrest. Therefore, the exclusionary rule should not be applied.

The New York Court of Appeals employed a similar rationale in *People* v. *Adams,* 53 N. Y. 2d 1, 422 N. E. 2d 537 (1981). The issue in that case was consent to search and the proper standard of review for the practical, factual judgment of the police officer on the scene. A police officer, alerted by a commotion across the street, saw a man, later identified as the defendant, holding a gun to a woman's head. The officer intervened, the gunman fired several shots at the officer and then fled. The woman identified herself as the gunman's girlfriend and told police that the gunman had more guns and

[9] Sixteen of the judges formally joined this opinion. The other eight expressed no doubt as to its correctness and concurred in the result. *See id.* at 848. (Rubin J. specially concurring).

ammunition in a closet in his apartment. She then led the police to the apartment, opened the door with a key in her possession and pointed out the closet. Inside, police found a rifle and ammunition.

The defendant moved to suppress the evidence on the ground that the girlfriend lacked the authority to consent to the search of his apartment. The motion was denied and the New York Court of Appeals affirmed his subsequent conviction. The Court reasoned that application of the exclusionary rule would be improper because the police had made a reasonable judgment as to the girlfriend's common authority over the premises. Hence, there was no misconduct to punish or deter. The Court concluded,

> Detached from the tension and drama of the moment, it is sometimes easy for an appellate court to lose sight of the fact that it is the reasonableness of police action which is the linchpin to analysis of any case arising under the Fourth Amendment. When judged in accordance with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act" (Brinegar v. United States, 338 U.S. 160, 175, 69 S. Ct. 1302, 1310, 93 L.Ed. 1879), the police conduct of securing the rifle and ammunition in the defendant's closet was a reasonable response to the situation in which they found themselves and, therefore, was not proscribed by the exclusionary rule. 422 N. E. 2d at 542.

E. Williams and Adams Are Consistent With Traditional Fourth Amendment and Exclusionary Rule Jurisprudence

These decisions are consistent with traditional Fourth Amendment and exclusionary rule jurisprudence.

In *Husty* v. *United States,* 282 U. S. 694 (1931), for example, this Court was asked to suppress evidence seized in a search that had been based, in large part, upon an informant's tip. The tip did not indicate the basis of the informant's knowledge. This Court nevertheless refused to suppress the evidence and held that the determination of probable cause was a reasonable one.

This Court quickly rejected the argument that the determination was unreasonable because it was based upon hearsay and held that the search should be tested under the traditional *Carroll* standard of probable cause. "To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched." *Id.* at 700-701 (citations omitted).

In applying this standard, this Court then used language strikingly similar to that of the proposed modification of the exclusionary rule: "Here the information, *reasonably believed by the officer to be reliable,* that Husty, known to him to have been engaged in the illegal traffic, possessed liquor in an automobile of particular description and location; the subsequent discovery of the automobile at the point indicated, in the control of Husty; and the prompt attempt of his two companions to escape when hailed by the officers, were *reasonable grounds* for his belief that liquor illegally possessed would be found in the car." *Id.* at 701 (emphasis added).

In *Hill* v. *California,* 401 U. S. 797 (1971), police with probable cause to arrest one person arrested another person by mistake. A search incident to the arrest revealed evidence of crime. The defendant moved to suppress the evidence because of the police error. This Court held that the evidence should not be suppressed, noting that "on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time." *Id.* at 804.

In *Jones* v. *United States,* 362 U. S. 257 (1960), this Court was asked to suppress evidence seized pursuant to a search warrant on the grounds that the search warrant was based upon hearsay and the search warrant affidavit did not establish

probable cause. This Court disposed of the first issue by holding that hearsay could be the basis for a warrant. On the second issue, this Court deferred to the judgment of the magistrate. This Court did not consider the question of probable cause *de novo*. It did not consider whether the warrant should have been issued in the first place. Rather, the Court ruled that the initial determination was a reasonable one and, therefore, should not be invalidated:

> We cannot say that there was so little basis for accepting the hearsay here that the Commissioner acted improperly. The Commissioner need not have been convinced of the presence of narcotics in the apartment. He might have found the affidavit insufficient and withheld his warrant. But there was substantial basis for him to conclude that narcotics were probably present in the apartment, and that is sufficient. *Id.* at 271.

Accord, Rugendorf v. *United States,* 376 U. S. 528, 533 (1964).

Thus, the motion to suppress was denied in *Jones* not because this Court necessarily believed there was probable cause, but because the search warrant affidavit contained such relevant evidence as a reasonable mind *might* accept as adequate to support the conclusion that narcotics were probably present in the apartment.

This is the test used in at least two Circuits for reviewing search warrants on motions to suppress. The United States Court of Appeals for the Sixth Circuit follows the rule that the exclusionary sanction should be invoked to suppress evidence seized pursuant to a search warrant only if the initial determination of probable cause was arbitrary. *See, United States* v. *Hatfield,* 599 F. 2d 759, 761 (6th Cir. 1979); *United States* v. *Giacalone,* 541 F. 2d 508, 513-14 (6th Cir. 1976); *United States* v. *Nicholson,* 303 F. 2d 330, 332 (6th Cir. 1962). In *Nicholson,* the Sixth Circuit explained its reason for the deferential standard of review:

> Whether probable cause exists requires an act of judgment formed in light of the particular situation and with account taken of all the circumstances. Because many situations are more or less ambiguous, a determination that probable cause exists should be accepted by this Court unless it is shown that the Commissioner's judgment was arbitrarily exercised." *United States* v. *Nicholson,* 303 F. 2d 330, 332 (6th Cir. 1962).

The Fifth Circuit follows a similar rule and did so even before *Williams.* In *United States* v. *Chester,* 537 F. 2d 173 (5th Cir. 1976), the Court held that on a motion to suppress, the test a reviewing court "must apply is not whether the [search warrant] affidavit's hypothesis *necessarily* follows, but whether the magistrate could *reasonably* conclude that it *probably* follows." *Id.* at 176 (emphasis partially added).

F. The Proposed Modification of the Exclusionary Rule Rests on the Same Policies as Those Underlying the Traditional Standard of Probable Cause

The practical resemblance between the cases following the traditional standard of probable cause and the cases following the proposed "reasonable grounds" exception to the exclusionary rule is not surprising. In formulating his proposed modification of the exclusionary rule, Justice White analogized to the reasonable good faith defense available to government officers sued for damages for acts done in connection with their official duties. He reasoned that if reasonable good faith precludes the imposition of damages, it should also prevent invocation of the exclusionary rule.

This Court drew the same analogy and followed the same logic in *Carroll* v. *United States,* 267 U. S. 132 (1925), when it formulated the now traditional definition of probable cause. This Court noted the rule that if a warrantless seizure proves to be mistaken "the officer may escape costs or a suit for damages by a showing that he had a reasonable or probable cause for

the seizure. *Stacey* v. *Emery,* 97 U. S. 642. The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported." *Id.* at 155-156.

This Court then decided to adopt the same standard of legality for suppression hearings:

"We here find the line of distinction between legal and illegal seizures of liquor in transport in vehicles. It is certainly a reasonable distinction. It gives the owner of an automobile or other vehicle seized under Section 26, in absence of probable cause, a right to have restored to him the automobile, *it protects him under the Weeks and Amos cases from use of the liquor as evidence against him, and it subjects the officer making the seizures to damages." Id.* at 156. (emphasis added)

In giving content to the probable cause standard, this Court again analogized to the defense of good faith and probable cause available to government officers sued for damages. This Court noted, "In *Stacey* v. *Emery,* 97 U. S. 642, 645, a suit for damages for seizure by a collector, this Court defined probable cause as follows:

> If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."

Id. at 161.

This Court added another formulation drawn from a similar setting:

> "In the case of the *Director General* v. *Kastenbaum,* 263 U. S. 25, which was a suit for false imprisonment, it was said by this Court (page 28):
>
> > 'But, as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within the knowledge of the Direc-

> tor General's agent, which in the judgment of the Court would make his faith reasonable'." *Carroll* v. *United States, supra.* 267 U. S. at 161-162.[10]

Thus the proposed modification of the exclusionary rule is, in essence, a return to the traditional standard of probable cause and to the judgment, made in *Carroll,* that reasonable determinations of probable cause should be respected on motions to suppress just as much as they would be respected in a civil suit for damages against the arresting officer. In practice, then, it would be very difficult to distinguish between the *Carroll* standard and the reasonable grounds exception to the exclusionary rule.

III.

THE DETERMINATION OF PROBABLE CAUSE IN THE INSTANT CASE WAS REASONABLE AND THEREFORE SHOULD NOT HAVE BEEN OVERTURNED ON A MOTION TO SUPPRESS.

Applying these standards in the present case, it is plain that the evidence seized here should not have been suppressed. At the outset petitioner notes that this case involves something more than a conclusionary accusation of guilt. Thus, the per se rule of *Nathanson* v. *United States,* 290 U. S. 41 (1933), does not apply.

The proper test under the Fourth Amendment, if the matter were considered *de novo,* is whether the facts and circumstances set forth in the search warrant affidavit made it probable that there were illegal drugs or drug paraphernalia in

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[10] In dissent in *Carroll,* Justice McReynolds protested this analogy, noting, "This is not . . . an action against the seizing officer for a tort." "Whether the officers are shielded from prosecution or action by Rev. Stat. Sec. 970 is not important." *Carroll* v. *United States,* 267 U. S. 132, 163, 164 (1925) (McReynolds J. dissenting).

respondents' car and residence. The proper test on the motion to suppress is whether, based on these same facts and circumstances, Judge Lewis could reasonably conclude that there were probably illegal drugs or drug paraphernalia in respondents' car and residence.

Petitioner respectfully submits that Judge Lewis' assessment of the probabilities was a reasonable one, even assuming *arguendo* that it was mistaken. Therefore, the exclusionary rule should not apply.

First: the anonymous letter describes the defendants' activities in detail and sets forth facts and circumstances supporting its conclusion that police will find illegal narcotics in the defendants' house and car. The letter identifies the defendants by name, tells where they live, says that they "strictly make their living on selling drugs", and notes that the defendants "brag about the fact they never have to work, and make their entire living on pushers." The letter observes that the defendants "are friends with some big drugs dealers, who visit their house often." The letter explains where the defendants buy their drugs and how they pick the drugs up. "Most of their buys are done in Florida. Sue, his wife, drives their car to Florida where she leaves it to be loaded up with drugs, then Lance flys (sic) down to drive it back." The letter then goes on to describe the respondents' immediate travel plans. "May 3 she is driving down there again and Lance will be flying down in a few days to drive it back." The letter then notes "At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement."

The circumstances set forth in the letter are plainly incriminating, if true, and the nature and extent of its detail provide strong evidence that the letter is based upon its author's personal knowledge rather than upon surmise or rumor.

It is also noteworthy that the letter came to police from an ordinary citizen who volunteered his information rather than from a paid police informer who was paid for his information. People who sell information to police have a financial incentive to fabricate false accusations in order to have something to sell. This is not true for citizen informers who volunteer their information and the informant in this case had no apparent reason to lie.

Police were able to verify several details in the anonymous letter through their investigation and through the observations of law enforcement agents who maintained surveillance over Gates during his journey. This greatly reduced the possibility that the informant was reporting a made-up story or the product of someone's speculation. Police verified that the defendants lived where the informant said they did. Police confirmed that Lance Gates flew to Florida on May 5, 1978, as predicted by the informant. Police verified that upon arriving in Florida, he went to a motel room registered to his wife, again consistent with the prediction of the informant. Police ascertained that Gates left the motel the next morning and got into his own car which had already been driven to Florida, again consistent with the informant's prediction. Finally, police verified that Gates left the West Palm Beach area and drove north on an interstate highway commonly used by travelers to the Chicago area, once again consistent with the prediction of the informant.

Police investigators not only corroborated the informant's tip; they also uncovered a number of circumstances that lent credence to the tip and greatly diminished the possibility that the defendants were ordinary vacationers and the anonymous letter merely a malicious prank by a friend or neighbor who knew only that the defendants would be vacationing in Florida in early May. The defendants' trip to Florida had all the earmarks of a drug run and none of the earmarks of an ordinary vacation. The typical vacationing family would travel

to Florida together, stay for a while, and then return by the same mode by which they came. The average vacationer would not, as Lance Gates did, fly from Chicago to West Palm Beach, Florida, arrive in the evening, go directly from the airport to a motel, check into a room registered to his wife, leave the motel at 7:00 a.m. the next morning, get into his own car, which was somehow waiting for him in Florida, and drive directly back toward Illinois.

This itinerary suggests a number of things. First, Lance Gates' short stay in West Palm Beach, Florida suggests that he was anxious to minimize the time that his home in Illinois would be left unattended. This, in turn, is consistent with the informant's statement that there were over $100,000.00 worth of drugs in the basement of the Gates' home in Illinois. A person with valuables of that sort might well be inordinately fearful of burglars.

Second, the short stay suggests that Gates' trip to Florida had a business purpose rather than a recreational purpose. Since Lance Gates went only to his motel room and his car before leaving, the natural inference is that Lance Gates went to Florida to pick something up and drive it back to Illinois. That Gates drove back to Illinois, rather than flew, despite his evident concern for haste, suggests that he was transporting something that he did not want to ship or send through airport security, something over which he wished to maintain constant and exclusive control. Given that Florida is the major port of entry for illegal narcotics brought into the United States,[11] a

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[11] A publication of the Drug Enforcement Administration, The National Narcotics Intelligence Consumers Committee, Narcotics Intelligence Estimate, The Supply of Drugs to the U.S. Illicit Market From Foreign and Domestic Sources in 1979 reports at page 10:

> Reflecting the heavy south-to-north flow of cocaine and marihuana from South America, Florida remained the prime smuggling gateway to the illicit U.S. drug market. Approximately 40

(Footnote continued on following page)

fact this Court may judicially notice, see, *Carroll* v. *United States*, 267 U. S. 132, 159 (1925), the natural inference is that Gates was bringing narcotics of some sort back to Illinois, just as the anonymous letter predicted. Indeed, it is difficult to imagine any other plausible explanation for the journey.

Petitioner submits that these facts made it probable that there were illegal drugs in respondents' car and residence, as predicted in the anonymous letter. In any event, Judge Lewis' judgment that these facts established a probability, even if mistaken, was a reasonable judgment. Therefore, the exclusionary sanction should not have been invoked.

It is true that these facts give more cause to believe that there were drugs in respondents' car than that there were drugs in respondents' residence. The latter aspect of the letter is not as amply corroborated. But it should be remembered that the search warrant sought drug paraphernalia as well as drugs. If, as seemed evident at the time the warrant was issued, respondents were drug dealers who were using their home as the base of their operations, it would be reasonable to infer that respondents probably kept some drug paraphernalia, such as scales or bags, in their residence. This inference, which later proved to be accurate, cannot be characterized as unreasonable. Therefore, even assuming *arguendo* that Judge Lewis made a mistake when he determined that there was probable cause to search for drugs and drug paraphernalia in respondents' residence, his mistake was a reasonable one and the evidence seized at the residence should not be suppressed.

(Footnote continued from preceding page)

percent of all cocaine and 30 percent of all imported marihuana moved through the State, representing an estimated retail value of approximately $25 billion. Most of the counterfeit Quaalude shipments smuggled by air and sea were also destined for the Florida area.

IV.

CONCLUSION

Because of the foregoing, the decision of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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Respondent's Brief

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In the
Supreme Court of the United States
October Term, 1982

THE STATE OF ILLINOIS,
Petitioner,
vs.
LANCE GATES and SUSAN GATES,
Respondents.

RESPONDENTS' BRIEF ON REARGUMENT

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QUESTION PRESENTED

Whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Weeks* v. *United States*, 232 U.S. 383 (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

No. 81-430

THE STATE OF ILLINOIS,

Petitioner,

vs.

LANCE GATES and SUSAN GATES,

Respondents.

RESPONDENTS' BRIEF ON REARGUMENT

SUMMARY OF ARGUMENT

Before discussing the question of whether the Federal exclusionary rule, first announced in *Weeks* v. *United States,* 232 U.S. 383 (1914) and later applied to the States in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), should to any extent be modified, Respondents initially discuss the Illinois exclusionary rule originally announced by the Illinois Supreme Court in 1923. It is urged that the Illinois exclusionary rule constitutes an adequate and independent state ground for the decision of the Illinois Supreme Court in this case. Hence, any modification of the Federal exclusionary rule would be merely an advisory opinion of this Court as there is no case or controversy.

Given the sixty-year history of the Illinois exclusionary rule, and given the failure of Petitioner to suggest any modification of either the Federal or State exclusionary rule in the Illinois courts, the Petitioner has waived the issue. Thus, this case is distinguishable from this Court's decision in *Delaware* v. *Prouse,* 440 U.S. 648 (1979) and *California* v. *Krivda,* 409 U.S. 33 (1972).

Because of Petitioner's waiver the record in this case is insufficient to evaluate either a "good faith" or "reasonable belief" modification of the exclusionary rule. Basic principles of orderly litigation and the fundamental principles of federalism and comity make it inappropriate for this Court to consider any "good faith" or "reasonable belief" modification in this case.

In direct response to this Court's order of November 29, 1982 Respondents argue that the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, should *not* be modified in any way.

The vagaries of any exception based upon a "good faith" or "reasonable belief" standard less rigorous than probable cause cannot preserve either the deterrent function of the exclusionary rule, the law of probable cause, or the warrant process.

Despite urgings by Petitioner, and supporting *amici,* to adopt an exception to the exclusionary rule, they offer no criteria to inform this Court how to apply any proposed exception, despite this Court's keen concern for the exclusionary rule's deterrent function. The recent decisions of this Court that have allowed the use of illegally seized evidence in limited, peripheral areas provide no precedent for the proposed exception. In these areas, (grand juries, civil trials, impeachment) this

Court's rationale was that the deterrent function of the rule would be unaffected. The proposed exception is distinguishable from those limited areas in that an exception couched in terms of "good faith" or "reasonable belief" is really suggesting a change in the substantive law of probable cause.

A re-examination of this case in light of the "good faith" or "reasonable belief" rationale discloses that any attempt to justify the search under these proposed exceptions has no foundation in the record before the Court. Neither Petitioner's repeated assertion of "good faith mistakes" and "reasonable errors," nor of an "intensive investigation" are supported by the record.

When the police act upon apparently settled law which is later changed; or when police act upon *specific, identified, unavoidable factual* mistakes, their conduct may be excusable. But those mistakes are qualitatively different from the illegality in this case. The total lack of probable cause in this case cannot be tolerated within the framework of the Fourth Amendment.

A "reasonable belief" exception to the exclusionary rule may, at first blush, sound reasonable. Upon closer scrutiny, however, such a meaningless standard quickly degenerates into a series of *ad hoc* judgments that nullify the objective law of probable cause, leave the police with no guidelines, make the decisions of magistrates unreviewable and destroy the deterrent function of the exclusionary rule. Since the Fourth Amendment already prohibits "unreasonable searches," the adoption of a reasonable error test would create an unworkable and meaningless standard of a "reasonable-unreasonable

search." Petitioner's own brief demonstrates the futility of such a formula—calling for a "reasonable belief" exception to the exclusionary rule and in the same breath seeking a modification of the "reasonable" search criteria of probable cause.

Moreover, within the definition of probable cause, this Court has already announced that a limited benefit of the doubt will be extended in instances in which a warrant has issued. However, the affidavit supporting the search warrant in the instant case cannot be read as being a "close case" or even "close to a close case." The unknown tipster and the corroboration of merely innocent or trivial information does not even approach probable cause.

The proposed exception in this case is especially dangerous in that it is not aimed at police misconduct in street encounters, but rather, it is aimed at the warrant process itself. The vagaries of a "good faith-reasonable belief" exception to the exclusionary rule would make warrant decisions *ad hoc* and virtually unreviewable. This Court has consistently recognized the necessity of review of the warrant process, so that the existence, or not, of probable cause can be preserved in the record for review on appeal.

Moreover, since warrant searches are really institutional actions, any attempt to test the "good faith-reasonable belief" of a single police officer at the end of a chain of police involvement would erode the body of probable cause law and, in effect, turn the Fourth Amendment on its head.

Further, there is no demonstrable need to change the exclusionary rule. Empirical studies show that illegal searches rarely prevent prosecutions for violent crimes. All existing studies indicate that the exclusionary rule has little, if any, impact on the crime rate.

In contrast to its modest cost, the single most important benefit conferred by the rule is that it gives meaning and substance to the otherwise empty guarantees of the Fourth Amendment.

The prolonged debate over the exclusionary rule will not end, and the full measure of its benefits will not be realized until this Court makes it eminently clear that police noncompliance with the Fourth Amendment will not be tolerated, and that the rule is here to stay. Perhaps, once this debate is laid to rest, the critics of the rule can redirect their energies towards even more compliance with the letter and spirit of the Fourth Amendment.

Finally, Respondents urge this Court to carefully consider those cases dealing with the retroactive or prospective application of any major Fourth Amendment change, and the consequences of such action.

ARGUMENT

I.

THIS CASE DOES NOT PRESENT A PROPER OCCASION TO CONSIDER WHETHER TO MODIFY THE FEDERAL EXCLUSIONARY RULE.

A. The Illinois Exclusionary Rule provides an adequate and independent state ground for the decision of the Illinois Supreme Court in this case.

It is a basic principle of federal jurisprudence that "this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions." *Fox Film Corp.* v. *Muller,* 296 U.S. 207, 210 (1935). *See also Minnesota* v. *National Tea Co.,* 309 U.S. 551, 558 (1940); *Henry* v. *Mississippi,* 379 U.S. 443, 446 (1965). In their previous brief, Respondents set forth the reasons why one ground for the Illinois Supreme Court's ruling — that there was no showing of probable cause as required by the Illinois Constitution — constitutes an adequate and independent state ground for the disposition of this case. Respondent's Brief at 24-27 [hereinafter R.Br.].[1]

[1] The Illinois Supreme Court found the warrant to be improperly issued and the search illegal according to Article I, § 6 of the Illinois Constitution, as well as the Federal Fourth Amendment. Therefore, the former holding constitutes an adequate and independent ground under state law for the decision. It should be noted that the *Aguilar-Spinelli* formulation of probable cause has been explicitly adopted as the standard for Illinois state law; hence the discussion of that standard by the Illinois Supreme Court was a discussion of both state and federal law. *See People* v. *Parker,* 42 Ill. 2d 42, 245 N.E. 2d 487 (1969)

Similar considerations show that the Illinois exclusionary rule constitutes an adequate and independent ground for the disposition of this case regardless of any change or modification this Court might make in the Federal exclusionary rule. Accordingly, modification of the Federal exclusionary rule in this case would contravene settled law prohibiting this Court from issuing merely advisory opinions in which there is no genuine case or controversy. *Herb* v. *Pitcairn,* 324 U.S. 117, 125-26 (1945).

To reach the question of modifying the exclusionary rule, this Court must first agree with the Illinois Supreme Court that Petitioner has failed to show probable cause. However, once this preliminary issue is decided, there is no question that the evidence seized in the illegal search must be suppressed even in the absence of a Federal exclusionary rule. Controlling Illinois law mandates that illegally seized evidence be suppressed. Hence, the issue now raised by Petitioner is advisory only and non-justiciable.

As this Court noted in *Elkins* v. *United States,* 364 U.S. 206, 227 (1960), many states had independently adopted exclusionary rules prior to any extension of the Federal rule. Illinois was one of those states. The Illinois Supreme Court adopted an exclusionary rule to enforce the State Constitution's prohibition against unreasonable searches in *People* v. *Brocamp,* 307 Ill. 448, 138 N.E. 728, 732 (1923). There the Court stated:

> Our holding is that the unlawful search and seizure aforesaid violates the provision of our [Illinois] *State Constitution.* (emphasis added)

This doctrine was again enunciated in *People* v. *Castree*, 311 Ill. 392, 142 N.E. 112 (1924). Nineteen years later in *People* v. *Perry*, 1 Ill. 2d 482, 116 N.E. 2d 360, 363 (1953), the Illinois Supreme Court noted:

> Since the decision of this court in *People* v. *Castree*, there can be no doubt that the courts of this State are committed to the [exclusionary] rule. (citations omitted).

In other words, the Illinois exclusionary rule was adopted independently of the Federal rule and far in advance of *Mapp* v. *Ohio*, 367 U.S. 643 (1961).[2] Its authority derives from the law and Constitution of the State of Illinois. Moreover, the Illinois exclusionary rule was adopted prior to *Wolf* v. *Colorado*, 338 U.S. 25 (1949), in which the Fourth Amendment of the

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[2] *People* v. *McNeil*, 53 Ill. 2d 187, 290 N.E. 2d 602, 604 (1972) dealt with the history of the Illinois exclusionary rule in stating:

> Reported decisions reflect that the courts of all jurisdictions have recognized a distinction between the unreasonable search and seizure itself and the question of the admissibility of evidence so obtained. . . . This court had long followed the then minority rule—that of exclusion (*People* v. *Brocamp* (1923), 307 Ill. 448, 138 N.E. 728; *City of Chicago* v. *Lord* (1955), 7 Ill.2d 379, 381, 130 N.E.2d 504; *People* v. *Kalpak* (1957), 10 Ill.2d 411, 428, 140 N.E. 2d 726), which had also been the prevailing rule in the Federal courts. . . . The pronouncements of this court . . . were squarely in line with the Federal courts on the constitutional considerations which led to the adoption and application of the exclusionary rule, as was reflected in *People* v. *Castree* (1924), 311 Ill. 392, 143 N.E. 112, and *these decisions gave full recognition to the prohibitions of our own [Illinois] constitution against unreasonable searches and seizures.* (emphasis added)

Federal Constitution was made binding on the states, but in which this Court refused to make the Federal exclusionary rule applicable to the states. Yet, as further illustration of the independent state ground for this case, the Illinois Supreme Court specifically refused to abandon the state exclusionary rule in light of *Wolf*. *See City of Chicago* v. *Lord*, 7 Ill. 2d 379, 130 N.E. 2d 504, 505 (1955) (noting that the Illinois exclusionary rule rests on "State and Federal constitutional considerations"). Subsequent to *Mapp* v. *Ohio*, the Illinois Supreme Court has adopted the view that illegally seized evidence must be suppressed under both the Illinois state exclusionary rule and the Federal rule. *See* Justice Schaefer's opinion in *People* v. *Parren*, 24 Ill. 2d 572, 182 N.E.2d 662, 664 (1962) (concluding that "[u]nder *neither* [Art. II § 6 of the Illinois constitution nor the Fourth Amendment] may a conviction stand when it is based upon evidence that is the product of an unreasonable search and seizure," citing *City of Chicago* v. *Lord*, *supra*).[3]

Given the sixty-year history of the Illinois exclusionary rule, this case is readily distinguishable from *Delaware* v. *Prouse*, 440 U.S. 648 (1979) for two reasons. First, unlike Delaware search law at issue in *Prouse*, Illinois adopted the exclusionary rule in 1923, long before *Wolf* and *Mapp*. Second, unlike *Prouse*, there is no discussion in the Illinois Supreme Court opinion of either the Illinois or Federal exclusionary rules because Petitioner

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[3] Petitioner cites language from Justice Schaefer's opinion in *Parren* but makes no reference to the Illinois exclusionary rule. Petitioner's Brief at 18.

never suggested a modification of either in the Illinois courts. *See* Joint App. at 1a.

In complete contrast to *California* v. *Krivda*, 409 U.S. 33 (1972), the Petitioner here waived the issue below. It would violate fundamental principles of comity and federalism for this Court to vacate or remand on an issue not previously raised.[3a]

Clearly, any modification of the Federal exclusionary rule by this Court can have no effect on the state constitutionally-based Illinois exclusionary rule. As stated in *Cooper* v. *California*, 386 U.S. 58, 62 (1967), a decision by this Court

> . . . of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.

Therefore, it is not necessary for this Court to consider any modification of the Federal exclusionary rule in order to decide this case. To do so would violate a settled canon of constitutional jurisprudence and run contrary to basic notions of federal and state sovereignty. *See, e.g., Minnick* v. *California Dept. of Corrections*, 452 U.S. 105, 122-27 (1981).[4]

[3a] *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977) (detailed discussion of states' rights).

[4] All further references to the "exclusionary rule" in the remainder of this brief will refer only to the Federal rule unless the Illinois rule is explicitly mentioned.

B. The record in this case is insufficient to evaluate either the "good faith" or "reasonable belief" of either the police officers who sought, or the judge who issued, the illegal warrant, and by failing to raise the issue in the Illinois courts, Petitioner has waived the question of whether the evidence seized is admissable despite an illegal search.

As noted below, Petitioner and its *amici* disagree as to whether subjective state-of-mind determinations, objective conditions, or both are appropriate standards for judicial application of the proposed "exception" to the exclusionary rule. For present purposes, however, it is sufficient to note that the bare-bones record in this case contains almost no facts regarding either the state-of-mind or the objective actions of the officials involved. There is simply no basis to match the standards against. Further, this total absence of record reflects Petitioner's failure to raise any issue regarding "good faith" or "reasonable belief" in any lower court.

In dicta, various members of this Court have raised the possibility of some type of limited "good faith" exception to the exclusionary rule suggesting that such an exception would have to meet both subjective and objective criteria. For example, in *United States* v. *Peltier,* 422 U.S. 531, 542 (1975), Justice Rehnquist raised the possibility of creating an exception based upon whether the officials involved "*had knowledge* [a subjective, state-of-mind standard] or *may be charged with knowledge* [an objective standard]" that the search was unconstitutional. *See also Stone* v. *Powell,* 428 U.S. 465, 540 (1976) (White, J. dissenting, discussing hypothetical situations in which police officers have acted *mistakenly,*

but in *good faith* [subjective standard] and on *reasonable grounds* [objective standard]).

As the following section will illustrate, the record in this case does not provide a scintilla of evidence regarding the state-of-mind of either the police officer or the judge involved. Further, the record is barren of any information upon which it is possible to judge whether the police "may be charged with knowledge" of their illegal conduct. There simply are no facts before this Court which would allow it to determine whether the actions of the police officer and the judge below were the result of a "mistake," or of "misconduct."

The total absence of *any* record on the issue Petitioner now raises at this late stage should preclude its consideration by this Court. As Justice White noted in *Cardinale* v. *Louisiana*, 394 U.S. 437, 438-39 (1969):

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons [why this Court] . . . has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions. . . . Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not complied with those questions in mind.

Basic principles of orderly litigation and "finality" of litigation, as well as fundamental notions of federalism and comity, make it inappropriate for this Court to consider a "good faith-reasonable belief" exception in this case. The record shows beyond dispute that Petitioner *never* sought to raise the issue below in more than four years of litigation and three levels of state

court review. Because Petitioner's failure to raise the issue in a timely fashion has precluded the Illinois courts from considering this issue, and because it has deprived this Court of any relevant factual record, Respondent invites the Court's close review of the progress of this case below.[5]

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[5] At the trial court level, Respondents presented a motion to quash the search warrant before Circuit Court Judge William Hopf, the former State's Attorney of DuPage County, Illinois, and now a Justice of the Illinois Appellate Court. The motion to suppress was argued and decided solely on the basis of the contents of the search warrant affidavit and the attachments thereto. Petitioner offered no testimony or any other evidence in opposition to the motion. On that bare record, Judge Hopf found that there had been no probable cause and granted Respondents' motion to suppress on September 21, 1978. At no time during the argument before Judge Hopf was the question of "good faith" or "reasonable belief" raised by Petitioner, nor did Judge Hopf consider the question in any fashion in this ruling.

In the Illinois Appellate Court, Petitioner filed a brief which contained two stated issues; both went solely to the legal issue of probable cause. Once again, neither "good faith" nor "reasonable belief" were mentioned. The issues stated in the State's Brief were as follows:

ISSUES PRESENTED FOR REVIEW

Whether the detail in the information which was provided to the affiant for the Search Warrant was sufficient to allow the issuing judge to infer that the hearsay declarant had obtained his information in a reliable manner.

Whether from the present facts the issuing judge could conclude that the author of the anonymous letter was an ordinary citizen and his/her credibility was established by the corroborating facts developed by the affiant's subsequent investigation.

It was not until February 8, 1982 that, as an afterthought, Petitioner sought leave to amend or enlarge the question presented for review in this Court. The main basis offered for Petitioner's request was the decision of the Fifth Circuit Court of Appeals in *United*

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[5] (Continued)

The opinion of the Illinois Appellate Court affirming the decision of Judge Hopf made no reference to any issue regarding "good faith" or "reasonable belief". (*People* v. *Gates*, 82 Ill.App. 3d 749, 403 N.E. 2d 77 (2d Dist. 1980), Jt.App. at 1b).

Similarly, in seeking leave to appeal in the Illinois Supreme Court, Petitioner stated that:

> The important question of whether the details in this informant's letter were in fact sufficient, and more significantly whether, as a matter of constitutional law, Illinois courts will recognize that law enforcement corroboration of an informant's information is indeed admissible and relevant to the determination of whether an affidavit provides sufficient information upon which to find probable cause for the issuance of a search warrant should be determined by this Court.

Petitioner did not urge "good faith" or "reasonable belief" as a basis for requesting the Illinois Supreme Court to review the suppression of evidence. When the Illinois Supreme Court granted the Petition for Leave to Appeal, Petitioner filed a brief in which only one issue was stated:

> Did the detailed information provided to police by the anonymous informer, coupled with government corroboration of the information, provide probable cause for the issuance of the search warrant.

The Illinois Supreme Court, in affirming the finding of no probable cause by the appellate and trial courts, made no mention of "good faith" or "reasonable belief." (*People* v. *Gates*, 85 Ill.2d 376, 423 N.E. 2d 887 (1981), Jt.App. at 1a).

States v. *Williams*, 622 F.2d 830 (1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981). *See* Petitioner's Motion for Leave to Amend or Enlarge Question Presented for Review, at 2-3. *Williams*, decided on July 31, 1980, provides no excuse whatsoever for Petitioner's failure to raise the issue in the Illinois Supreme Court. Indeed, briefing and argument of this case in the Illinois Supreme Court occurred subsequent to *Williams* and the Illinois Supreme Court did not hand down its decision until June 26, 1981, nearly a full year after *Williams*.

On this record, it is clear that Petitioner is engaged in an end-run around the Illinois Supreme Court. Having failed there, Petitioner now seeks to have this Court overturn the consistent decisions of three levels of Illinois courts on the basis of an issue those courts were never allowed to consider. To permit the Petitioner's use of such diversionary tactics to avoid the highest Court of a State would fly in the face of the most elementary principles of federalism and comity, even in the absence of a state exclusionary rule. (*See* Order for Reargument at 2, Stevens, J., dissenting: "[general considerations of sound appellate practice] apply with added force when the judgment of the highest court of a sovereign state is being reviewed").

In sum, the adequate and independent state ground for affirming the suppression of evidence in this case, the total silence of the record regarding either "good faith" or "reasonable belief," and Petitioner's indisputable waiver are each sufficient to dispose of the issue now before the Court. Respondents respectfully urge this Court to hold that the present issue is not properly before it.

Nevertheless, in view of the Court's order directing the parties to brief the issue now under consideration, and in view of the fundamental importance of that issue for the future enforcement of the Fourth Amendment, Respondents will address the various "good faith" and "reasonable belief" exceptions proposed by Petitioner and the various *amici* in support thereof.

II.

THE "EXCEPTION" SOUGHT BY PETITIONER WOULD DILUTE THE "BROAD DETERRENT PURPOSE" OF THE EXCLUSIONARY RULE, THE LAW OF PROBABLE CAUSE, AND THE WARRANT PROCESS.

The crucial question in this case is whether any general "good faith-reasonable belief" exception[6] that is less rigorous than probable cause can preserve the deterrent function of the exclusionary rule. Respondents respectfully submit that the present case demonstrates that no such lesser standard is workable.

This conclusion is forcefully demonstrated by the vague, amorphous and drifting descriptions of the various "exceptions" proposed in this case. Indeed, the vagaries inherent in the abstract speculations surrounding the proposed exceptions are evident in the fact that Petitioner and the various *amici* in support thereof do not offer any unified concept of what the "exception" might be. Petitioner states that it seeks an "exception" but really does nothing but reargue probable cause under twenty and even sixty-year-old cases. The Solicitor Gen-

[6] Respondents use the term "good faith-reasonable belief" exception only out of the need to have a label for the proposals, not because the phrase has any meaning.

eral urges a "good faith-reasonable belief" exception but offers no criteria to define it. Other *amici*, correctly sensing the quicksand on which the "good faith-reasonable belief" exception rests, retreat to and call for a blanket exception for *all* warrant searches. All of these formulations would drastically dilute, if not entirely destroy the essential deterrent function of the rule.

As discussed below, the proposed exception rests upon a fundamental misunderstanding of this Court's Fourth Amendment jurisprudence and a lack of appreciation for the meaning of probable cause as the operative definition of the "reasonableness" requirement of the Fourth Amendment. If adopted, it would reduce the law of the Fourth Amendment to a plethora of double-talk discussing the "reasonableness of unreasonable searches." It would also destroy the fragile safeguards of the warrant process and undo the hard-won institutional reforms of police practices that have been generated by the exclusionary rule.

A. Preservation of the broad deterrent function of the exclusionary rule has been a consistent and unchallenged requirement of Fourth Amendment jurisprudence.

The history, nature, and purposes of the exclusionary rule are well known to this Court. In recent opinions — and in concurring and dissenting opinions — this Court has traced the development of Fourth Amendment jurisprudence. There have been important disagreements among members of this Court regarding the nature and purpose of the exclusionary rule. Earlier decisions tended to treat the rule as a constitutionally-mandated remedy for violations of constitutional rights set forth

in the Fourth Amendment. *See Weeks* v. *United States*, 232 U.S. 383 (1914); *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Kaufman* v. *United States*, 394 U.S. 217 (1969); *Brown* v. *United States*, 411 U.S. 223 (1973).

More recently, and perhaps beginning with *United States* v. *Calandra*, 414 U.S. 338 (1974), a majority of this Court has taken a narrower view of the nature and purpose of the rule on the ground that its primary purpose is the deterrence of illegal searches. These differences of opinion are certainly weighty matters of constitutional interpretation.[7] Respondents respectfully submit, however, that these differences in viewpoints make no difference in deciding the issue at hand. Contrary to the "cost-benefit analysis" proposed by Petitioner and *amici* supporting Petitioner, this Court has never questioned the "broad deterrent purpose of the exclusionary rule" itself. *Stone* v. *Powell*, 428 U.S. 465, 468 (1976). Only last term, this Court exhibited a keen concern with maintaining this function. In *United States* v. *Johnson*, ... U.S. ....., 102 S.Ct. 2579, 2593-94 (1982), this Court decided to give retroactive application to its decision in *Payton* v. *New York*, 445 U.S. 573 (1980) to protect the deterrent function of the rule:

> If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would

[7] Indeed, Respondents submit that there is considerable validity to the Court's earlier interpretation of the rule. *See, e.g.*, Schrock and Welsh, *Up from* Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 Minn.L.Rev. 251 (1974-1975).

be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question. Failure to accord *any* retroactive effect to Fourth Amendment rulings would "encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach." *Desist* v. *United States*, 394 U.S. 244, 277 (Fortas, J., dissenting) (footnote omitted).

Thus, while "the application of the [exclusionary] rule has been restricted to *those areas where its remedial objectives are thought most efficaciously served*" *Stone* v. *Powell*, 428 U.S. 465, 486-87 (1976) (citing *United States* v. *Calandra*, 414 U.S. 338, 348 (1974) (emphasis added), this Court has *never* expressed a willingness to undermine the core deterrent function of the rule. To the contrary, the preservation of the rule's deterrent function has been a central concern in recent Fourth Amendment cases. This case differs drastically from others in which limited, peripheral uses of illegal evidence were allowed in situations in which this Court was convinced that deterrence would be unaffected.[8]

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[8] The first case allowing the use of illegal evidence for a limited purpose was *Calandra*, *supra*, in which the Court held that illegally seized evidence could be used in grand jury proceedings without substantially reducing the deterrent function of the rule. Of course, the unique setting of grand jury proceedings, involving both secrecy and the allowance of a wide range of evidence that might not be admissible at trial reduced the likelihood that deterrence would be adversely affected.

The peculiar context of the use of illegally seized evidence in *United States* v. *Janis*, 428 U.S. 433 (1976)—the admission of such evidence in civil trials—exhibits

In contrast, this case threatens the warrant process at the heart of the Fourth Amendment. It also threatens the viability of the objective and workable "long prevailing standard" of probable cause against which the legality of police searches are measured. *Dunaway* v. *New York*, 442 U.S. 200, 208 (1979). Moreover, the "good

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[8] (Continued)

the same type of analysis and the same conclusion that the infrequent use of such evidence in proceedings peripheral to criminal prosecution could not impair the deterrent function of the rule.

More recently, in *United States* v. *Havens*, 446 U.S. 620 (1980), the Court held that illegally seized evidence could be used for the limited purpose of impeachment at trial. Once again, the peculiar context of the issue, especially the fact that the evidence became admissible only because the defendant provoked the admission by testifying falsely, provided a unique rationale for the admission of illegally seized evidence without jeopardizing the rule's deterrent function. *Compare, Harris* v. *New York*, 401 U.S. 222 (1971).

It hardly bears comment that the peripheral uses of illegally seized evidence in *Calandra, Havens*, and *Janis* provide no precedent for the "exception" Petitioner seeks. The illegal evidence here is sought for the purpose of convicting Respondents at trial. It is not a peripheral use; there are no peculiar or unique considerations that apply to minimize the detrimental effect on deterrence. Any allowance of the use of the illegally seized evidence to convict Respondents in this case would cripple the deterrent function of the exclusionary rule.

Stone v. *Powell*, 428 U.S. 465 (1976), is not on point since *Stone* did not develop an exception to the application of the rule, but only held that review by federal courts in a federal habeas corpus proceeding was unnecessary to advance the deterrent function where there had been a full hearing in the state courts on the suppression question.

faith-reasonable belief" exception proposed by Petitioner and various *amici* is *qualitatively different* from any of the narrow exceptions to the application of the rule this Court has created. As discussed more fully below, any "good faith-reasonable belief" exception would not merely carve out some limitation in the application of the rule. Rather, it would create chaos regarding the legal standards of the Fourth Amendment itself and would reduce the objectively based search and seizure standards of probable cause to a series of *ad hoc*, unpredictable judgments.

B. The "good faith-reasonable belief" exception sought by Petitioner (and the Solicitor General) does not rest upon any showing of actual good faith, but merely upon an untestable assertion of good faith.

As noted above, "good faith belief" implies an actual state-of-mind, subjective condition while "reasonable" implies an objective condition. Respondents will examine each of these purported conditions in the context of the present case and show that, as used in Petitioner's proposed test, neither is anything more than an empty and meaningless label.

Consider Petitioner's repeated assertions that there was no "misconduct" by either the "well trained"[*]

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[*] Petitioner does not indicate how a "good faith-reasonable belief" exception would take account of the wide disparity of police training. *The 1975 Presidential Commission on Law Enforcement and the Administration of Justice*, 120, 137, documented the vast difference in training between federal and state, and rural and city police officers:

> Commission surveys show that there is substantial variance in the quality of police personnel in the

police who sought, or the judge who issued, the illegal warrant. Certainly there is "misconduct" measured by an objective *malum prohibitum* standard. In direct contravention of the Fourth Amendment, the police sought, and the judge issued, a warrant without probable cause; the application for the warrant, the warrant itself, and the search that followed all violated the law.

What Petitioner must be understood to say, therefore, is that there was no "intentional" misconduct, that it was all a mistake. Indeed, Petitioner, the Solicitor General, and supporting *amici* repeatedly speak of "mistakes," "errors" and "blunders." But it must be recognized that all of these terms are mere *assertions* that have no foundation in the record. *See supra*, footnote 5. Petitioner never clarifies what is to be meant by "mistake" or "error." It cannot be seriously contended that intentional misconduct occurs only when officials seek, issue or act upon a warrant *known* to be illegal. Intentional misconduct may also occur when officials make no effort to know or comply with the law, or negligently fail to inquire what the law is when it is their indisputable duty to do so. This Court treats "negligent" conduct as being within the ambit of the exclusionary rule and has contrasted it to "good faith" conduct. *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974). Clearly

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[9] (Continued)

United States. They indicate that, in general, law enforcement personnel meet their difficult responsibilities with zeal, determination, and devotion to duty. They also indicate that many actions of individual police officers and administrators are ill-conceived.

Of course, there is no record regarding the training or experience of any of the police involved in this case. *But see* note 10a, *infra*.

the deterrent function of the exclusionary rule is and must be aimed at illegality resulting from such derogation of duty.

How can Petitioner assert that none of the various forms of intentional misconduct occurred in this case? The answer is that neither Petitioner nor any of the courts that have heard this case can say there was no misconduct here. The question was never explored and there is no record pertaining to it.[10] Petitioner attempts to sidestep this void in the record by asserting that the "well trained" police made an "intensive investigation" in this case, while the Solicitor General cites their "meticulous care" (Soliciter General's *Amicus Curiae Brief*) [hereinafter S.G.Br. at 44]. Aside from the logical gap between that particular premise and the conclusion that there was no misconduct, it cannot be seriously contended that the record shows any "intensive investigation." To the contrary, the record shows only the puffing-up of trivial information. The *entire* record of the investigation in this case is the affidavit of Detective Mader supporting the search warrant. According to the affidavit, Detective Mader:

> (1) Checked with the Illinois Secretary of State and discovered that one Lance B. Gates was issued a valid Illinois drivers license at an address of 209 D. Dartmouth, Bloomingdale, Illinois.
>
> (2) Talked to a confidential informant who reviewed certain financial records and reported an address of 198 B. Greenway Drive, Bloomingdale, Illinois for one Lance B. Gates.

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[10] Contrast the lack of record here to the specificity of the holding in *Hill*, discussed *infra*, as cited in Petitioner's brief at 22: "*on the record before us* the officer's mistake was understandable. . ."

(3) Spoke to a Chicago Police officer assigned to O'Hare Airport who told Mader that "one L. Gates, phone number 980-8427 was registered on Eastern flight 245, departing on May 5, 1978 at 4:15 P.M., and that the flight went first to Atlanta and on to West Palm Beach, Florida.

(4) Found that phone number 980-8427 was a non-published number listed to Lance Gates at 189 B. Greenway Drive, Bloomingdale, Illinois.

(5) Was advised by DEA Agent Morely that a person matching the physical description furnished by the Secretary of State and using the name Lance Gates boarded flight 245 on May 5, 1978.

(6) Discovered that Gates arrived in West Palm Beach and took a taxi to a Holiday Inn and entered a room registered to Susan Gates.

(7) On May 6, 1978 Gates and a female departed the Holiday Inn and entered a red vinyl over gray Mercury bearing Illinois 1978 license RS 8437 (registered to Gates but to a different auto) and headed north on an interstate highway.

For the text of the affidavit, *see* Joint App. at 10b.

An investigation that produces only innocent information is neither "intensive" nor productive, regardless of the experience, training or number of officers or informants who participate. The only facts regarding Respondents' *behavior* that were produced by the "investigation" were that Lance Gates did fly to Florida and that he drove his wife back to Chicago. (As noted below, the latter fact is not consistent with the unknown tipster's letter). This information, wholly innocent on its face, can hardly be described as the result of an "intensive investigation."

Consider the plethora of obvious inquiries that the police might have made but did not (perhaps such in-

quiries were made, but did not disclose any corroborating facts). First, the anonymous letter alleged that Respondents "are friends with some big drug dealers who visit their house often" (*See* P.Br. at 27). However, there is no indication that the police sought or obtained any facts from informants with knowledge of marijuana dealings as to whether they had any information regarding Respondents. Second, there is no indication that the police made any attempt to determine *when* or *why* Mrs. Gates went to Florida. The anonymous letter alleged that she would go on "May 3" but police did *not* verify this date or determine how long she had been in Florida. As noted below, this omission is important because all of Petitioner's efforts to show probable cause depend upon the flimsy notion that Respondents were only in Florida for a "short stay" (P. Br. at 29)—but the record is *silent* as to how long Mrs. Gates was in Florida. Moreover, while the letter alleged that Mrs. Gates would "leave" the car in Florida, the affidavit shows that she remained there to meet her husband. Despite this inconsistency, and the lack of knowledge as to when or why Mrs. Gates went to Florida, the police simply *assumed* that the anonymous and unsupported tip was true. In addition, the anonymous tip said that Respondents were not employed but had a substantial income, yet there is no indication the police inquired about Respondents' occupations, income or style of living. The police could also have undertaken a surveillance of Respondents on their return trip from Florida to Bloomingdale, Illinois; or conduct a surveillance of their residence for the almost three days between receipt of the

anonymous letter and the arrest.[10a] Only speculation could tell what, if anything, such investigation might have produced. If the Gates were "major drug dealers," as Petitioner suggests, then why didn't the police check their long distance phone calls to determine the number and location of their long distance phone calls? Rather than make any of these significant inquiries (or despite the lack of any significant corroboration if such inquiries proved fruitless), the police instead corroborated trivial and innocent information on the basis of which they sought and obtained a warrant clearly lacking in probable cause. Given the superficial nature of the inquiries made in this case, there is no basis whatsoever for the conclusion that misconduct or bad faith were absent.

Petitioner and the Solicitor General offer a solution to this defect in their proposed "exception." Notwithstanding their characterization of the exception as dependent on "good faith" and the absence of "misconduct," they propose to overcome the embarrassing lack of a record on these points by asking this Court to prohibit defendants from making any inquiry about the *actual* conduct of the officials involved. Thus, the Solici-

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[10a] While the record is silent, there can be no serious doubt that the police could have made more intensive inquiries. In a recent newspaper interview about this case, Detective Mader, now the police commander, is quoted as follows:

> Says Mader, "I am not an attorney. I felt we reacted as well as we could. I felt we had done everything proper." But in retrospect, he said, if he had understood the exclusionary rule as well then as he does now, he would have conducted a surveillance to better corroborate the letter before seeking the warrant. *The Chicago Lawyer*, vol. 6, number 1, January 1983, at 7, col. 4.

tor General suggests that "inquiries into the subjective state of mind of a particular officer" will be "generally irrelevant." Rather, "a court will need to determine only whether a *reasonably well-trained* police officer *should have known,* in light of the *extant principles* of law, that his conduct was prohibited." (S.G.Br. at 7) (emphasis added).

Thus, although the proposed exception would be labeled as a "good faith" exception, defendants are not to be allowed to test the actual good faith of the police. This is consistent with present restrictions on defendants' opportunities generally to go behind the allegations of an affidavit to test police veracity. *Franks* v. *Delaware,* 438 U.S. 154 (1978) (defendants may go behind affidavit only on a preliminary showing of perjury or reckless disregard for the truth). Such a restriction on challenges to searches may be valid at present where the critical question is whether the objective test of probable cause is met. But it cannot be seriously suggested that the fruits of unlawful police conduct should be "excepted" from the exclusionary rule on the basis of the "good faith" of the police, but that defendants should not be entitled to inquire as to whether there is *actually* good faith. The suggestion that defendants be precluded from such inquiries exposes the "good faith" title of the exception sought by Petitioner and the Solicitor General as mere window dressing without a shadow of substance.[11]

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[11] Justice White noted the impracticality of factual inquiries into an officer's or magistrate's actual state of mind in *Massachusetts* v. *Painten,* 389 U.S. 560, 565 (1968) (White, J., dissenting):

> . . . sending state and federal courts on an expedition into the minds of police officers would

The meaningless use of the term "good faith" in the present case is highlighted by comparison to other cases in which this Court has admitted evidence under circumstances which might be labeled as "good faith." Essentially, these cases fall into two categories, both of which might be said to involve *unavoidable* "good faith" failures to comply with the Fourth Amendment. First, consistent with Justice White's hypothetical discussion of the inability of police to comply with retroactive changes in the law in *Stone* v. *Powell*, 428 U.S. at 539 (White, J. dissenting), this Court has allowed the admission of evidence where police acted upon apparently settled law or regulations. *See, e.g., United States* v. *Peltier*, 422 U.S. 531 (1975); *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973). There could be a common sense application of the "good faith" concept in such situations because the violation of the Fourth Amendment was *unavoidable* due to the *impossibility* of knowing the law would change.

Second, this and other courts have allowed the admission of evidence in a variety of situations where compliance with the law was compromised by a *specific, identified* and *unavoidable factual* mistake. For example, in *Hill* v. *California*, 401 U.S. 797 (1971), this Court allowed the admission of evidence despite such an error

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[11] (Continued)

> produce a grave and fruitless misallocation of judicial resources.

Respondents do not disagree with this assessment of the general impracticality of such inquiries. Rather, Respondents' point is that an exception can hardly be based on "good faith," "mistake" or "belief," if no inquiry on those factual questions is permitted or practical.

when the police, acting upon probable cause, arrested the wrong person as a result of a misidentification, the arrestee having physical characteristics very similar to the suspect. Here, too, it is possible to talk about "good faith" in a common-sense fashion. The police did apply the law, and did have probable cause to make an arrest. Nevertheless, this Court declined a "good faith" rationale for the holding, preferring to use "the touchstone of reasonableness" under the Fourth Amendment:

> [The police] were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time.

Id. at 804.

Petitioner also cites *People* v. *Adams*, 53 N.Y.2d 1, 422 N.E. 2d 537 (1981) as a "reasonable judgment" exception to the exclusionary rule. But like *Hill*, *Adams* does not involve any broad misjudgment regarding probable cause. Rather, like *Hill*, *Adams* involves a *very specific mistake as to one fact*, namely that the police mistakenly thought that the defendant's girlfriend had common authority to consent to a search of the apartment. Moreover, the search in *Adams* occurred under exigent circumstances. The police obviously had little opportunity to carefully investigate the girlfriend's authority to consent, and her behavior presented a clear appearance of authority. Thus, the facts in *Adams* are completely different from those in the present case.

Although *Adams* has not been endorsed by this Court, and Respondents offer no opinion as to its validity, the *specific, identified,* and *unavoidable factual* mistakes which were excused in *Hill* and *Adams* are arguably consistent with the preservation of the deterrence function. In both cases, the police sought to follow the law but were prevented from doing so by a specific, unavoidable, *factual* mistake. Excusing the small number of illegal searches that rest on unavoidable factual mistakes of that kind might not threaten the deterrent function of the rule. Moreover, it is possible to talk of "good faith" in both cases because it is possible to identify the *unavoidable* nature of the mistakes in each case.

Similarly, the use of the term "good faith" in *United States* v. *Williams,* 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied,* 449 U.S. 1127 (1981), is readily distinguishable from the present case. In *Williams,* the police officer arrested the defendant in the belief that she was violating a court-imposed travel restriction. Most of the judges of the court of appeals held that there was probable cause for arrest. In a second opinion, however, a smaller majority of the court (some judges joined both opinions) held that, regardless of the legality of the arrest, the fruits of the resulting search would not be suppressed because any error was at most a "good faith" action taken in a "reasonable, though mistaken, belief" that the arrest was legal. *Id.* at 840. The somewhat expansive dicta in *Williams* is unfortunate because it clouds the very specific and narrow type of identified mistake (or presumed mistake) made by the

police officer (*i.e.*, whether a contempt of court was an arrestable offense).[11a]

What is important for the present issue is the vast difference between the specific, narrow, understandable "mistakes" in *Hill*, *Adams*, and *Williams*, and the fundamental failure to observe the most basic principles of probable cause in the present case. As discussed in the next section, there is no specific factual mistake here—there is no narrow or technical point of law involved. Instead, the police sought, and the judge issued, a warrant that failed to even approach probable cause because it was unsupported by any substantial showing of a likelihood of criminal activity. Indeed, there is *no* precedent upon which a warrant may be issued on nothing more than a tip from an *unknown* source.

C. Petitioner offers no criteria for determining when an error regarding the law is "reasonable": and, even assuming *arguendo* that the police who sought and the judge who issued the warrant in this case mistakenly believed it to be lawful, there is no reason to conclude that such belief was "reasonable."

On examination, the "reasonable belief" component of the proposed "exception" proves to be as devoid of

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[11a] The second majority in *Williams* expressly refrained from applying the "good faith" notion to *warrant* searches, such as the one involved here. *See* 622 F.2d at 840 n.1. *See generally* the critique of *Williams* in Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating The Police and Derailing The Law*, 70 Geo.L. Rev. 365 (1981) [hereinafter *Mertens & Wasserstrom*]; Of course, this Court declined to adopt a "good faith" standard only last term in *Taylor* v. *Alabama*, ... U.S. ....., 102 S.Ct. 2664 (1982).

meaning as the "good faith" component. Although it has a superficial appeal, any attempt to excuse "reasonable errors" about the requirements of the Fourth Amendment quickly degenerates into a series of *ad hoc* judgments that have neither logic nor identifiable criteria. Adoption of such an "exception" would nullify the objective law of probable cause, leave the police with no guidelines, make the decisions of magistrates unreviewable for all practical purposes, and cripple the deterrent function of the exclusionary rule.

Consider first the illogic of a reasonable error test. The Fourth Amendment prohibits "unreasonable searches." As a criteria of reasonableness, it requires that no warrant shall issue except upon a showing of probable cause. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated, and no Warrants shall issue, but upon *probable cause,* supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (emphasis added)

Hence it is clear that when a search warrant is found to lack probable cause, it has by definition been found "unreasonable."

Mr. Friedman was quite correct in his testimony before the Senate Subcommittee when he stated:

> In short, the fourth amendment already has a reasonableness requirement in it. When the courts say that a search was no good, or a pat down was no good, they are telling the police officer, "You acted unreasonably." The objective standard, a reasonable police officer under those circumstances would have known that this was not sufficient for

> a pat down, it was not sufficient for a stop, it was not sufficient for a full search. That is what the fourth amendment says against unreasonable searches and seizures.

The Exclusionary Rule Bills: Hearings on S. 101, S. 751 and S. 1995 Before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 97th Cong., 1st Sess. 152 (1981). (testimony of Leon Friedman) [hereinafter *Hearings*].

Similarly, another commentator warns:

> Inclusion of the reasonableness prong in the good faith test is, in fact, somewhat ironic given that the fourth amendment proscription is itself couched in the language of reasonableness. Where a court applying the good faith test holds that an officer's erroneous belief was reasonable, the court will in effect be suggesting that either (1) it is permissible for an officer to be ignorant of certain portions of the fourth amendment, or (2) it is permissible for an officer to use less than his best judgment, perception, or efforts in seeking to comply with fourth amendment requirements. In other words, all that is required of officers is a reasonable good faith attempt to conform to the law. This sounds reasonable—until, of course, one considers extending the same innocuous language to other areas like legislators and the first amendment, or to defendants in antitrust cases.

Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies,* 73 J.Crim.L.&Criminology, 875, 897-98 (1982). (footnotes omitted) [hereinafter *Schlag*]. Thus, the proposed exception amounts to an allowance for "reasonable errors" about the unreasonableness of a search; that is a *"reasonable, unreasonable search."* The proposition is meaningless.

The "reasonable belief" exception becomes even more untenable when this Court's formulation of the probable cause standard is understood. As stated in *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969) (citations omitted):

> In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal acitvity is the standard of probable cause, that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, and that their determination of probable cause should be paid great deference by reviewing courts. But we cannot sustain this warrant without diluting important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry (footnote omitted).

Given this broad formulation of the nature of probable cause, it is obviously double-talk to refer to a "reasonable mistake" as to whether probable cause exists.

Indeed, the confusion in Petitioner's own brief forcefully demonstrates the futility of any attempt to apply such a hopeless formulation. Again and again, Petitioner's brief drifts back and forth between calls for a "reasonable belief" exception to the exclusionary rule and arguments that seek a modification of the "reasonable" search criteria involved in the determination of probable cause itself. At the outset, Petitioner's brief takes the untenable position that this Court should first conclude that there *is* probable cause and then should *"go on"* to consider modification of the exclusionary rule (P.

Br. at 2). Then, in seeking some basis for arguing that the police exercised "reasonable judgment" in this case, Petitioner relies almost entirely on twenty to sixty year-old decisions of this Court *reflecting the development of probable cause standards themselves.* (P. Br. at 16-19, 21-23, 24-26) (emphasis added). Indeed, Petitioner admits that there is not "much difference between the proposed exception and the somewhat dated formulations of probable cause upon which Petitioner relies."[12] (P.Br. at 19). And instead of identifying any criteria by which an "exception" to the exclusionary rule could be created, Petitioner calls for the reversal of the now well-settled *Aguilar-Spinelli* tests for determining probable cause (*See, e.g.,* P.Br. at 16, 19).

Petitioner also attempts to evade the serious legal implications of the proposed "exception" by repeatedly characterizing probable cause determinations as only "practical, *factual*" matters. (P. Br. at 2, 6, 11, 15) (emphasis added). Thus, Petitioner never addresses the need to formulate objective *legal* criteria for either probable

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[12] The Petitioner in his brief on reargument urges this Court to follow the same "analytic approach" as this Court did in *Jones* v. *United States.* That analytic approach was further refined in *Aguilar* and later in *Spinelli.* Respondents still maintain the position that the *Jones-Aguilar-Spinelli* line of thought are totally consistent with each other. Recalling what Chief Justice Burger said in *U. S.* v. *Harris,* 403 U.S. 573, 583 (1971):

> *Aguilar* cannot be read as questioning the "substantial basis" approach of *Jones.*

Respondents thus concur with Petitioner that this Court should follow the same analytic approach as in *Jones,* but would go one step further and respectfully urge this Court to follow the guidelines of *Jones,* as later refined in *Aguilar* and *Spinelli.*

cause formulations themselves, or for any "good faith-reasonable belief" exception to the exclusionary rule.

Instead, Petitioner makes the remarkable argument that "courts considering motions to suppress should not substitute their judgment for the judgment of those charged with making the decision in the first instance." (P. Br. at 11) In the context of Petitioner's failure to set out any legal criteria to guide the application of the "good faith-reasonable belief" exception — or probable cause itself, for that matter — this argument is nothing less than the suggestion that warrants should be entirely unreviewable. As discussed below, that argument flies in the face of this Court's long-standing defense of the integrity of the warrant process.

Perhaps sensing the conceptual muddle of the proposed exception, Petitioner concludes his brief by rearguing the probable cause issue itself, despite the absence of any request from this Court to do so. The lack of any coherent conceptual framework and the absence of any objective criteria for the application of the proposed "reasonable belief exception" demonstrate that Petitioner seeks nothing less than a blank check for all searches conducted under the color of a warrant.

The treatment of the proposed "exception" by the various *amici* is equally vague. For example, the Solicitor General complains that "[t]he uncertainties inherent in police work are exacerbated by a lack of coherent Fourth Amendment standards that are readily recognizable and predictably applied by officers in the field." (S. G.Br. at 29). However, after calling for a "good faith reasonable belief" exception in abstract terms for more than 50 pages, the Solicitor General then merely opines

that the many "*practical details concerning the application of* [*the*] *exception are best left to future cases* and initial resolution by the lower courts . . ." (S.G.Br. at 56) (emphasis added).[13] But what criteria are to guide the future decisions of lower courts? The Solicitor General's unwillingness to confront that issue is nothing less than a concession that no such criteria exist.

In short, the absence of any criteria in the proposals put forward by Petitioner and supporting *amici* amply demonstrates the validity of the warnings of commentators who have tried to understand what the "good faith-reasonable belief exception" would mean in practice.[14]

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[13] *See also* S.G.Br. at 26, n.7:

> *We need not here essay a precise delineation of the contours of an appropriate "good-faith" exception.* At a minimum, it would cover the situation in which it can fairly be concluded that no reasonable police officer could have appreciated that his conduct was barred by the Fourth Amendment. At its broadest, it would exclude from its embrace only those "flagrantly abusive" violations (*Brown* v. *Illinois,* 422 U.S. at 610) (Powell, J., concurring) that any minimally trained police officer should have known to be prohibited. This case does not call upon the Court to refine the concept very far. (emphasis added)

[14] Petitioner's suggestion that the deterrent function of the exclusionary rule should be subjected to the same considerations as might apply in a tort suit situation is misplaced. However, the use of a slippery "reasonableness" analysis to excuse flagrant and gross misconduct in one recent § 1983 action certainly suggests the arbitrariness of the approach. See the recent opinion of the Seventh Circuit in *Salinas* v. *Breier,* 32 Cr.L.Rep. 2305, (7th Cir. Dec. 12, 1982) (reversing an award of $16,000 by the district court). In that case, police conducted strip searches and "body cavity searches" of a defendant's entire family, including his wife and children ranging

One insightful commentary reaches the following conclusion:

> On first impression, the good faith type tests appear reasonable. The allure of the tests, however, rests only in the high degree of abstraction by which they are offered and defended: "How could one ask any more of a law enforcement officer than reasonable good faith?" When the machinations of this formalism are laid bare it becomes apparent that the good faith type tests are nothing more than epistemological artifice.

Schlag at 914.

For similar reasons, an acknowledged expert on Fourth Amendment law concludes that the "reasonable belief" standard is "nonsense":

> . . . it is nothing short of nonsense to talk of a reasonable belief that there is probable cause, for the probable cause standard itself takes into account reasonable mistakes of fact. If mistakes of law were also to be taken into account, then the law becomes whatever the officer thinks it is.

Letter from Wayne LaFave, to Senate, *Hearings*, 793-94.

Of course, a "good faith-reasonable belief" exception might be narrowly defined as simply giving the benefit of the doubt in borderline judgments to police officers acting under exigent circumstances (which is not involved here) or to warrant magistrates or judges. Undoubtedly, there are some borderline judgments in the application of the law of probable cause, just as there are in the

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[14] (Continued)

from an infant to a 9-year old, when there was no arguable probable cause to search them at all beyond a frisk for weapons. No contraband of any kind was found during the search. Nevertheless, the Seventh Circuit excused the search as "reasonable."

application of most legal principles.[15] But this Court has already announced that a limited benefit of the doubt will be extended in instances in which a warrant has issued. *See Aguilar* v. *Texas*, 378 U.S. at 111, quoting *Jones* v. *United States*, 362 U.S. at 271:

> [W]hen a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judically competent or persuasive character than would have justified an officer in acting on his own without a warrant," • • • and will sustain the judicial determination so long as "there was *substantial basis* for [the magistrate] to conclude that narcotics were probably present. . ." (emphasis added).

But Petitioner does not seek that traditional, limited benefit of the doubt in this case. That is understandable because the scant record in this case does not present an arguably close issue. Once all the puffery regarding commonplace information about names, addresses, phone numbers and license plates is put to one side, it is clear that there is no *substantial basis* for a warrant.

The anonymous letter certainly cannot be accorded any credibility on its face. This is not a case of an "anonymous" tip in the sense of an informant who is

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[15] Of course, the "good faith" test would not eliminate close cases. To the contrary, because it tends to be a subjective and an *ad hoc* assessment it is likely to produce at least as much disagreement as a probable cause test. See the recent developments in the continuing litigation following this Court's decision in *Brewer* v. *Williams*, 430 U.S. 387 (1977). On appeal following remand, the Eighth Circuit split 5-4 over whether the officer could be said to have acted in "good faith." ..... F.2d ....., Opinion filed 1/10/83, Case No. 82-1140.

known to the police but not openly identified; rather, this is a situation in which *the police knew nothing about the source or motivation* behind the letter. Even assuming that the detective and judge involved did not know the "two-prong" test in the *Aguilar-Spinelli* formulation in any detail,[16] it is clearly unreasonable to base a warrant on a tip of wholly unknown origin or reliability. (Indeed, Detective Mader did puff up various parts of the affidavit he executed in a way that shows that he knew proof of the credibility of the source of a tip was needed).[17]

Moreover, as the Illinois Supreme Court concluded, the so-called "corroboration" of the letter did not corroborate anything of substance, but only "innocent activity" that did not support any inference of criminal activity. Looking beyond all of the puffing in the affidavit regarding "confidential informants" who provided addresses, the Illinois Supreme Court correctly summed up the *entire* relevant content of the affidavit as follows:

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[16] A complete analysis of the facts of this case as applied to the "two-prong" analysis is contained in Respondents' original brief commencing at p. 16.

[17] *See, e.g.*, Joint Appendix at 10b-11b:

> On May 3, 1978, I contacted a *confidential informant known to me for the past two year period. I have received information from this person several dozen times, resulting in seven criminal arrests with convictions in all cases.* This confidential informant reviewed certain financial records available to him and told me that he located one LANCE B. GATES residing at 198 B. Greenway Drive, Bloomingdale, Illinois. . . . (emphasis added)

Unfortunately, all the information this valued and reliable "confidential informant" was asked to provide was Respondents' *address.* The address proved to be incorrect.

> Looking to the affidavit submitted as support for Detective Mader's request that a search warrant issue, we note that the corroborative evidence here was only of clearly innocent activity. Mader's independent investigation revealed only that Lance and Susan Gates lived on Greenway Drive; that Lance Gates booked passage on a flight to Florida; that upon arriving he entered a room registered to his wife; and that he and his wife left the hotel together by car. *The corroboration of innocent activity is insufficient to support a finding of probable cause.*

Jt. App. at 12a (citations omitted) (emphasis added). It would hardly be "reasonable" to reach any other conclusion.

There is nothing about the trip to Florida that provides any basis for probable cause. On its face, the trip was far more likely than not have a wholly innocent explanation. For example, Mrs. Gates might have been in Florida on a business or vacation trip, her husband flying down merely to assist her in driving home. Significantly, though the anonymous letter states that Mrs. Gates would "leave" her car for her husband to pick up, she did *not* do so, but waited for her husband to join her. *This aspect of the tip was contradicted.* (The police apparently never identified when Mrs. Gates arrived in Florida, why she came, or what she did while she was there). Moreover, none of the Gates' behavior was suspicious; Mr. and Mrs. Gates traveled under their own names in their own car with their own license plate. The DEA Agents who observed Mr. Gates board and deplane did not report any suspicious conduct. The simple fact is that if the destination of the trip had been anywhere but Florida, Petitioner would not be able to offer even the feeble inferences upon which they now assert prob-

able cause (*See* P. Br. at 27-30).[18] Where an investigation is as insubstantal as this, and corroborates nothing but innocent (and largely trivial) information, it cannot be seriously argued that there is a "close" issue upon which the police and magistrate should receive the benefit of the doubt. That being so, it would seriously injure the warrant process to defer to the magistrate's clearly erroneous decision in this case. Under *any* test of probable cause, it was clearly an "unreasonable" warrant and search.

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[18] At a number of points, Petitioner's discussion of probable cause exhibits a careless disregard of the bare record in this case. First, Petitioner asserts that "the letter came to police from an ordinary citizen who volunteered his information" (P. Br. at 28). How does petitioner know that it came from an "ordinary citizen?" Petitioner then asserts that the Gates' car "had already been driven to Florida . . . consistent with the informant's prediction." (P. Br. at 28). Clearly the car was in Florida, but the informant said that Mrs. Gates would drive it down on "May 3" and there is nothing in the record to indicate that Mrs. Gates had done so. Similarly, Petitioner states that "Gates left the West Palm Beach area and drove north on an interstate highway commonly used by travelers to the Chicago area, once again consistent with the prediction of the informant." (P. Br. at 28). Most of this is mere puffery—there is only one interstate going north from West Palm Beach and it would be used by travelers going anywhere but south Florida itself. More significantly, however, Petitioner fails to note that *Mrs. Gates was in the car, contrary to the informant's prediction.* Petitioner also asserts that Mr. Gates "was anxious to minimize the time his home in Illinois would be unattended"; again with no basis in the sparse record. (P. Br. at 29) And as a final creative addition to the record, Petitioner states that "the short stay suggests that [Mr.] Gates' trip to Florida had a business purpose" (P. Br. at 29) without admitting that the police did not know whether Mrs. Gates had had a short or long stay before that.

D. The "good faith-reasonable belief" exception would make warrants virtually unreviewable and would undermine both the warrant process and the substantive law of the Fourth Amendment.

The relationship of the warrant clause to the Fourth Amendment must be a primary concern in the resolution of this case. The warrant clause and its probable cause requirement have been viewed as the heart of Fourth Amendment enforcement. In case after case, this Court has made it clear that, except in exigent and extreme circumstances, the policy of the Fourth Amendment is to subject police requests for searches to the prior review of a detached and informed magistrate. As Justice Powell stated for the Court in *United States* v. *United States District Court,* 407 U.S. 297, 315-16 (1972):

> *The warrant clause* of the Fourth Amendment is not dead language. Rather, it has been "a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. *It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency.* It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement. (citation omitted; emphasis added)

See also Gerstein v. *Pugh,* 420 U.S. 103, 112-13 (1975), citing *Johnson* v. *United States,* 333 U.S. at 13-14:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. *Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead*

> *of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.* (emphasis added)

See also Franks v. *Delaware,* 438 U.S. 154, 164 (1978) (describing the warrant clause as "the bulwark of Fourth Amendment protection").

The proposed exception in this case is especially dangerous because it is *not* aimed merely at police split-second street decisions made under exigent circumstances (*e.g. Williams*), but rather at the warrant process itself.

Critical as it is for the operation of Fourth Amendment rights, the warrant process is indisputably fragile, and the "neutral and detached" judgment it requires is already strained by the practical limitations of the process. To begin with, magistrates need not by legally trained. *Shadwick* v. *City of Tampa,* 407 U.S. 345 (1972). Being entirely *ex parte,* the warrant process has none of the adversarial protections found in most other American judicial processes. Only those seeking the warrant appear before the magistrate. Moreover, there is no record of arguments or deliberations and no opinions for higher courts to review, only the warrant affidavit itself. Thus, there is always some danger that the proceedings and deliberation of the magistrate could become perfunctory and uncritical. Consider Barrett, *Criminal Justice*: *The Problem of Mass Production,* in the American Assembly, Columbia University, *The Courts, the Public, and the Law Explosion,* 85, 117-18, (1965):

> How can a magistrate be more than a "rubber stamp" in signing warrants unless he devotes at least some minutes in each case to reading the affidavits submitted to him in support of the request for a war-

> rant, and inquiring into the background of the conclusions stated therein? And where is the judicial time going to be found to make such inquiries in the generality of cases? The Los Angeles Municipal Court with annual filings of about 130,000 (excluding parking and traffic) *finds itself so pressed that in large areas of its caseload it averages but a minute per case in receiving pleas and imposing sentence.*

Moreover, given the practical obstacles of assigning warrant applications to magistrates and judges by rotation — as other cases are usually assigned — "magistrate shopping" (*i.e.*, the seeking out of the most permissive magistrates by police) is also a threat.

The sole influence countering these threats to the integrity of the warrant process is the review of such *ex parte* determinations of probable cause by other courts in hearings on motions to suppress or on appeal. Indeed, the real function served by the warrant process is that it forces the police to make a formal record of the information upon which a search is based—*knowing that the record can be reviewed for probable cause by the defendant in a later hearing;* that potential for review is the real check against arbitrary searches.

This Court has previously upheld the necessity of review of the warrant process in a long line of cases that protect the review of probable cause decisions underlying warrants. *See, e.g., Franks* v. *Delaware,* 438 U.S. 154, 184-85 (1978) (Rehnquist J., dissenting); *Spinelli* v. *United States,* 393 U.S. 410, 419 (1969); *Aguilar* v. *Texas,* 379 U.S. 108, 111 (1964); *Giordenello* v. *United States,* 357 U.S. 480, 483 (1958). Respondents respectfully urge that this Court not indirectly undermine the already

fragile warrant process by creating an amorphous exception to the exclusionary rule that would make warrants subject only to occasional and *ad hoc* review.[19]

Petitioner does not share this Court's concern for the integrity of the warrant process. To the contrary, Petitioner suggests that "[r]easonable determinations of probable cause, particularly those by judicial officers, should not be overturned on motions to suppress just because

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[19] It should also be noted that there is an air of unreality in the frequent allusions to the "rigid," absolute," or "Draconian" application of the exclusionary rule found throughout the briefs of Petitioner and Petitioner's *amici*.

As the Solicitor General observes, there is an "obvious reluctance of judges to condemn questionable practices under the Fourth Amendment when they know that the result of their decision will be the freeing of a guilty defendant." (S.G.Br. at 55). *See also* Wilkey, *A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak,* 62 Judicature 351, 356 (1979):

> Time and time again, . . . trial judges are blatantly hypocritical in construing the Fourth Amendment's definition of an unreasonable search and seizure because . . . the illogical penalty of total exclusion is damaging to the cause of justice.

As these critics of the rule concede, enforcement of the Fourth Amendment is clearly less than 100% at the present time. Compare the description of the limited review of probable cause and "plain view" search findings in criminal appeals in Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal,* 1982 Am.F. Res. J. 543, 598-600, 616-19 and 631-32. If, as seems likely, enforcement of the Fourth Amendment is already somewhat less than the formal standards announced by this Court, it can be reasonably assumed that enforcement under the amorphous standard of a "good faith-reasonable belief "exception" would be dismal indeed. This Court must not risk an even lower level of Fourth Amendment enforcement.

the reviewing judge believes that the initial determination was mistaken." (P. Br. at 11). Similarly, the Solicitor General suggests that "judicial miscalculation" should not be an occasion for application of the rule. (S.G.Br. at 42). Other *amici* are less hesitant; they openly seek a blanket exception for all searches pursuant to a warrant, regardless of probable cause. *See, e.g.*, Brief of *Amici Curiae* State of Florida, at 31 ("the rule should *never* be applied in cases involving duly issued warrants, absent a clear showing of fraud. . .") (emphasis added). The suggestion in the briefs of Petitioner and *amici* in support thereof that there can be no police "misconduct" when police act with "the authorization of a warrant" (S.G.Br. at 4) rests on an untenably simplistic view of modern policing in general, and the warrant process in particular.

E. The "good faith-reasonable belief" exception would seriously erode police compliance with the Fourth Amendment at both the individual and institutional level.

Much of the discussion of deterrence and police conduct in the briefs of Petitioner and supporting *amici* totally fails to comprehend that the law of search and seizure must apply to *institutions*, not just to individuals. Particularly in a warrant setting, a search is likely to involve a chain of individual officers who are involved in the investigation, the application for a warrant, and the actual conduct of the search. In short, warrant searches are institutional actions. It makes no sense to try to judge the "good faith," "reasonableness" or "good conduct" of such institutional actions by looking only to the behavior of a single officer. As Professor LaFave has noted, *Hearings* at 329:

> To apply the exclusionary rule when an individual officer oversteps his bounds but not when the violation of the fourth amendment is caused by systemic defects, it seems to me, would be to turn the fourth amendment on its head.

Justice Stevens noted this point in his concurring opinion in *Dunaway*, 442 U.S. at 221:

> The justification for the exclusion of evidence obtained by improper methods is to motivate the law enforcement profession as a whole—not the aberrant individual officer—to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional rights. For that reason, exclusionary rules should embody objective criteria rather than subjective considerations.

See also Justice Harlan's insightful opinion in *Whitely* v. *Warden*, 401 U.S. 560 (1971). In *Whitely*, this Court flatly rejected the idea that the good faith-reasonable belief of the arresting officer at the end of a chain of police information was relevant when police at the earlier stages in the chain had acted unlawfully and without probable cause. Precisely the same analysis should apply to warrants that were obtained on less than probable cause. It is *irrelevant* whether the officer executing a warrant acts with good faith if the officer who applied for it acted without probable cause.

III.

THERE IS NO DEMONSTRABLE NEED TO MODIFY THE RULE BEYOND THE SPECIFIC LIMITATIONS PREVIOUSLY ANNOUNCED BY THIS COURT.

A. The "costs" of the exclusionary rule are both finite and modest.

Over the last two decades, opponents of the exclusionary rule have repeatedly sought to paint an extreme

picture of its costs on criminal prosecutions and crime control. The standard tactic has been an expression of alarm that the rule frees "murderers," "rapists," "robbers," and others guilty of "violent" and "heinous" crimes.[20] These alarms are simply contradicted by the facts. A substantial and consistent body of empirical studies now shows that illegal searches very rarely prevent prosecutions for violent crimes. The detrimental impact of illegal police searches on prosecutions is almost entirely confined to a small proportion of arrests for possessory offenses involving drugs, gambling, pornography, or less frequently, illegal possession of a weapon. Even in these offenses, the rule results in the dismissal of only a very small minority of prosecutions.[20a]

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[20] *See, e.g.*, The Solicitor General's *amicis* brief at 50, n. 32; Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. Police Sci. and Admin. 36, 39 (1973).

[20a] Early studies seeking to assess the impact of the exclusionary rule found that the large bulk of motions to suppress evidence were concentrated in narcotics, weapons and gambling cases, and that there was a negligible level of successful motions to suppress in serious, violent crime. For example, Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U.Chi.L. Rev. 665, 686-87 and Table 7 (1970), reports 1965 data for Washington, D.C. showing that successful motions to suppress were made in only 1% of all other felonies.

More recently, two major studies by the Institute for Law and Social Research (INSLAW) have found that the exclusionary rule combined with suppression due to violations of other due process rights, results in only minimal levels of rejections of complaints by prosecutors or dismissals by courts. Forst, *What Happens After Arrest*, 67-68 (1977) reports that in the District of

For example, a systematic study of the impact of the exclusionary rule in federal prosecutions was conducted by the Comptroller General of the United States, Rep. No. GGD-79-45, *Impact of the Exclusionary Rule on Federal Criminal Prosecutions*, 11, 13, 14 (1979). The study revealed that only 0.4% of the prosecutions declined by prosecutors were rejected because of illegally seized evidence. Evidence was subsequently excluded in only 1.3% of 2,804 prosecutions, but only about half of those exclusions resulted in dismissals. Most were drug prosecutions.

The *data* in the recent report by the National Institute of Justice, *The Effects of the Exclusionary Rule: A Study in California* (Dec. 1982) [hereinafter *NIJ Report*], contrary to the efforts of the Solicitor General to argue otherwise,[21] does not alter the consistent

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[20a] (Continued)

Columbia less than 1% of all potential prosecutions were rejected by prosecutors and less than 2% of all prosecutions were dismissed by courts based on all due process violations, including illegal searches. A later multicity study, Kathleen Brosi, *A Cross-City Comparison of Felony Case Processing*, (1979), examined felony cases in four cities and concluded that the exclusionary rule has "little impact on the overall flow of criminal cases after arrest." She found that rejections by prosecutors in potential victimless crime categories for due process reasons, including illegal searches, ranged from only 2% to 4% in three cities and reached 9% in one. *Id.* at 16, Table 2.

[21] The Solicitor General's statement that "Prosecutors rejected approximately 30% of all felony drug arrests because of search and seizure problems. *NIJ Report* 2." is blatantly misleading. (S.G.Br. at 49). The Solicitor General's reference is to the statement in the second paragraph of the *NIJ Report* at 2 that states:

picture of the impact of the rule. Discussing statewide arrest statistics for California, the Solicitor General notes, correctly, that the *NIJ Report* shows that a mere ". . . 4.8% of the more than 4,000 felony cases *that were declined for prosecution* were rejected because of search and seizure problems." (emphasis added) (S.G.Br. at 48). That, however, is a rather incomplete view of the overall picture. For some reason, neither the *NIJ Report* nor the Solicitor General found it worthwhile to make the obvious comparison between the number of rejections caused by search and seizure issues and the total number of arrests. Fortunately, the raw data is reported and the computation is straightforward. Of 520,993 felony complaints referred to California district attorneys, they rejected only 4,130 (*NIJ Report* at 10) or *0.8 percent* on illegal search grounds—*i.e., only 8 in every 1,000 complaints were rejected on Fourth Amendment grounds.* It is mystifying how NIJ concluded that

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[21] (Continued)

> 32.5 percent of all felony drug arrests referred for prosecution in 1981 to *the Pomona* (*Los Angeles County*) *prosecutors office were rejected* at the initial case review because of search and seizure problems.

But the text of the report shows that this figure is based on a review of only one prosecutor's office in which 37 of 114 drug cases, or 32.5% were rejected because of illegal searches. The singling out of that aberrant and insignificant statistic as a "finding" raises extremely serious questions about the evenhandedness of the *NIJ Report*. Similarly, it is significant that the Solicitor General's brief never cites any data in the *NIJ Report* to back up the assertion that many defendants whose narcotics charges are dismissed after suppression of evidence "frequently" go on to commit crimes of violence.

this level of rejections constituted "a *major* impact of the exclusionary rule on state prosecutions". (S.G.Br. at 48; *NIJ Report* at 2).

Indeed, the *NIJ Report* confirms that the effects of the rule are modest even in narcotics cases. It should be noted that the 8.5%, 11.7% and 14.6% figures reported by NIJ (at 11) and cited by the Solicitor General (S.G.Br. at 48, n. 29) are all percentages of narcotics prosecutions *declined*, not of *all* narcotics prosecutions referred to prosecutors. While the *NIJ Report* does not state the total number of narcotics prosecutions, comparable data from the California Bureau of Criminal Statistics for 1980 shows that only 938 of 40,451 drug law violations, or 2.3%, were rejected because of illegal searches. The Bureau of Criminal Statistics data also shows that no murder prosecutions and only 0.096% of forcible rape prosecutions, 0.057% of robbery prosecutions, and 0.131% of assault prosecutions were rejected for illegal searches.[22]

Thus, the conclusion regarding the effects of the exclusionary rule on crime is not in doubt. Harvard political scientist James Q. Wilson, an authority on criminal justice, a member of the recent Attorney General's Task Force on Violent Crime, and a critic of the exclusionary rule, makes the following telling concession regarding the "costs" of the rule:

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[22] *See* Davies, *Do Criminal Due Process Principles Make a Difference?* 1982 Am.F. Res. J. 247, 267. Comparison of the actual number of the rejected prosecutions in each crime category reported by Davies with the numbers in the *NIJ Report* at 12, Table 3, shows the same negligible effect on violent crimes.

> [I]t would be a mistake, I think, to argue that the rule has contributed materially to the increase in crime. Very few prosecutions for the kinds of crime we most fear—mugging, burglaries, robberies—involve searches that might be challenged as unreasonable . . .

Wilson, *The Evidence Is in—Can We Use It?* Washington Post, Oct. 21, 1981, at A-27, col. 2.

Fears that the exclusionary rule operates to "free" or "release" criminals and prevents the "incapacitation" of career criminals in any substantial number are unfounded.[22]

Moreover, the "costs" of lost convictions are not simply costs of the exclusionary rule. More fundamentally, they are costs of police illegality.

> The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. *Mapp* v. *Ohio*, 367 U.S. at 659.

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[22] The Solicitor General's brief is inconsistent in evaluating the relationship of the exclusionary rule to the crime rate. It states that "the exclusionary rule contributes significantly to the Nation's crime problem," (S.G. Br. at 50) but it immediately qualifies that in a footnote by saying that modification of the rule will not "ensure reduction of the crime rate to any material extent." (*Id.*, n.32). If modifying the rule will have no noticeable impact, as the Solicitor General concedes, then it is clear that any statement that the rule "contributes significantly" to the crime rate is meaningless rhetoric.

B. The limited costs of the rule are not disproportionate to the value of the Fourth Amendment and the deterrent benefits of the rule.

The voluminous commentary on the exclusionary rule has identified many of its benefits. The principal benefit conferred by the rule is beyond dispute: it gives substance to the otherwise empty guarantees of the Fourth Amendment.

It is elementary that a right without a remedy has no substance. *Mapp.* This Court recognized this elementary truth with regard to the Fourth Amendment in *United States* v. *Robinson,* 414 U.S. 218, 224 (1973), where Justice Rehnquist noted:

> Because the rule requiring exclusion of evidence obtained in violation of the Fourth Amendment was first enunciated in *Weeks* v. *United States* . . . *it is understandable that virtually all of this Court's search-and-seizure law has been developed since that time.* (emphasis added) (citation omitted).

See also Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than an Empty Blessing,* 62 Judicature 337 (1979).

Without question the exclusionary rule has been the major impetus for police reform in the last two decades.[24]

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[24] The Solicitor General concedes that the rule has resulted in increased use of warrants and better police training. (S.G.Br. at 36.) *See also* note 10a, *supra. See also* Yale Kamisar's observation:

> [A]t the same time some critics of the exclusionary rule are urging its elimination or substantial modification on the ground, *inter alia,* that it has had little if any effect on police behavior and little if any impact on the amount of pre-*Mapp* illegality, other cri-

The Attorney General of Maryland has provided a concrete description of the effect of the rule on police conduct, training and policies:

> I can't offer statistical studies on the deterrent effect of the rule. What I can offer, however, is my testimony that I have watched the rule deter, routinely, throughout my years as a prosecutor. When an Assistant United States Attorney, for example, advises an FBI agent that he lacks probable cause to search for bank loot in a parked automobile unless he gets a better "make" on the car; or that the agent has a "staleness" problem with the probable cause to believe that the ski masks used in the robbery are still in the suspect's friend's apartment; or that he should apply for a search warrant from a magistrate and not rely on the "consent" of the suspect's sister to search his home—the rule is working. The principal, perhaps the only, reason those conversations occur is that the assistant and the agent want the search to stand up in court.
>
> Episodes like these are commonplace. They are part of the routine of every federal prosecutor with whom I have worked. . . . I strongly suspect that scenes like these are repeated daily throughout federal law enforcement and on homicide, narcotics, and gambling squads in cities throughout the country. . . .

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[24] (Continued)

> tics are calling for the rule's repeal or revision on the ground, *inter alia*, that in recent years the police have attained *such a high incidence of compliance with Fourth Amendment requirements* that "the absolute sanctions of the Exclusionary Rule are no longer necessary to police them." (citations omitted)

Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment*, 62 Judicature 66, 73 (1978).

> These contacts do not occur because of some self-limiting controls in the police and prosecutors themselves. I hope and trust that most of us in law enforcement are principled enough to avoid violating the clear constitutional rights of suspects. But in the heat of the chase, and in the absence of effective sanction, I believe that we would define those rights somewhat narrowly.

Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, I Criminal Justice Ethics, 28.30 (1982).[25]

Moreover, the frequent argument that the police do not know and cannot learn search and seizure law, (*e.g.*, Carrington, *et al., amicus* brief at 7-12) fails to take into account that police knowledge is a function of the demands made by the courts. Judge Herbert J. Stern of the Federal District Court in New Jersey, in his letter to the Senate Committee on the Exclusionary Rule Bills, observed:

> There is no doubt in my mind that the exclusionary rule does in fact deter law enforcement misconduct at every level. It is simply incredible to suggest that

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[25] Critics of the rule concede that the beneficial effects would be threatened by a "good faith-reasonable belief" exception. *See* Wilkey, *Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule*, (National Legal Center for the Public Interest; 1982) ("The 'good faith' exception puts a premium on ignorance and lack of training in law enforcement agencies."); Schlesinger, *Hearings* at 72, ("[such an exception] . . . could foster a careless attitude toward detail on the part of law enforcement officials, and might encourage police to see what can be gotten away with"). Indeed, even the Solicitor General does not "go so far as to say that adoption of a good faith exception would have no effect at all on the deterrability of Fourth Amendment violations." (S. G.Br. at 23).

> the police, the FBI, the District Attorney and the United States Attorney are impervious, uncaring, or ignorant of the search and seizure rules hammered out in our courts. It is, I think, a slander to suggest that our law enforcement authorities are either so stupid or so uncaring that they are unaffected or — if you will — undeterred by what the courts say they must do, and what they must not do.
>
> It is commonplace in this business for police departments to maintain large and well-staffed offices of legal counsel whose functions include keeping ordinary patrolmen up to date concerning changes in this area of the law. Rookie policemen undergo extensive training courses which concern themselves with the requirements of the Fourth and Fifth Amendments. Of course mistakes are made. Then, too, there are acts of deliberate lawlessness, even among those who are the guardians of the law. But in my experience the mainstream of our law enforcement people are concerned, aware, and do attempt to conform their conduct to the requirement of law, precisely because they know that if they do not it will profit them nothing. They will lose the fruit of their legal transgressions. The evidence will be suppressed.

Hearings at 808.

Professor LaFave has made the same point:

> To put the matter somewhat differently, if at a suppression hearing it is shown that the arresting or searching police officer acted illegally because of an insufficient understanding of the fourth amendment's limits on his power, this is hardly a case for withdrawing the exclusionary sanction on the ground that the policeman was not in a condition to be deterred in this case. Rather, it is an especially compelling case for applying the exclusionary rule so as to encourage the taking of such additional

steps as will enhance police understanding of these limits.

LaFave, *The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith'*, 43 U. Pitt. L. Rev. 307, 343 (1982).

The prolonged debate over the exclusionary rule clearly demonstrates that the full measure of its benefit — heightened police compliance with the Fourth Amendment — will probably not be realized until this Court makes it eminently clear that police noncompliance with the Fourth Amendment will not be rewarded by abolition or fundamental modification of the rule. Indeed, there has been a perverse logic underlying many of the critics' attacks on the deterrent impact of the rule. Critics have embraced the position that if they can just show that violations of the Fourth Amendment are flagrant enough, then the one existing mechanism for enforcing those rights—*i.e.*, the exclusionary rule—should be abolished or substantially restricted. So long as that perverse logic exists, there is less than full incentive for those who are hostile to the rule to accept the fact that enforcement of the Fourth Amendment is here to stay.[26] So long as it's critics maintain the possibility that the Court might

[26] The discussion of "alternatives" to the exclusionary rule, by critics of the rule, evidences a similar perversion of logic. If the exclusionary rule is an imperfect deterrent to violations of the Fourth Amendment, then the reasonable course would be to *supplement* the operation of the rule with one or more of the "alternatives" that have been discussed (*e.g.*, tort remedies, internal police disciplinary processes). There is no logical or practical reason why one or more of these mechanisms could not be put in operation as a supplement to the rule. Nevertheless, the stark fact is that in the two decades since *Mapp* there is virtually no evidence of attempts to imple-

abolish the rule, or modify it into oblivion, police administrators and personnel who are hostile to the rule will have less than sincere feelings about compliance with the Fourth Amendment.

As the array of *amicus* indicate, the critics have misread the deterrence analysis used by the Court and taken heart that the Court would eviscerate the vitality of the rule through the subterfuge of an unlimited "good faith-reasonable belief" exception. Their enthusiasm for the assault on the rule once again demonstrates the pressing need for this Court to state forcefully that the exclusionary rule is here to stay and that, regardless of the discrete exceptions which may from time to time be appropriate in unusual circumstances, this Court will not entertain any wholesale reduction on the scope of the exclusionary rule. Only when that is clear, will the energies of the critics be redirected from attacking the rule, and applied instead to seeking more complete compliance with the letter and spirit of the Fourth Amendment.[27]

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[26] (Continued)

ment any of these potential mechanisms. The unmistakable implication is that these proposals have not been aimed at improving compliance with the Fourth Amendment; rather, they have sometimes been put forward only to excuse the abolition or restriction of the rule.

[27] *See also* Chief Justice Burger's warning regarding the deleterious consequences of any overruling of the exclusionary rule:

> In a sense, our legal system has become the captive of its own creation. To overrule *Weeks* and *Mapp*, even assuming the Court was now prepared to take that step, could raise yet new problems. Obviously the public interest would be poorly served if law enforcement officials were suddenly to gain the impres-

Thus, assuming *arguendo* that the Court disagrees with Respondents' position that it is inappropriate for the Court to reach a "good faith-reasonable belief" exception in this case, Respondents respectfully urge this Court to announce in the clearest of terms possible that the exclusionary rule will not be effectively abolished by the proxy of a wholesale "exception" to its application.

IV.

ANY MODIFICATION OF THE EXCLUSIONARY RULE MUST BE APPLIED PROSPECTIVELY.

Assuming, *arguendo,* that this Court decides to modify the exclusionary rule so as not to require the exclusion of evidence obtained in the reasonable belief that a search was consistent with the Fourth Amendment, this Court should consider in what manner any modification will be applied. This Court has provided a wealth of case law concerning both the prospective and retroactive application of new standards and constitutional interpretations. A careful reading of these cases reveals that any modification of the exclusionary rule cannot be applied retroactively and only a prospective appli-

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[37] (Continued)

> sion, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on "criminals" had been declared. I am concerned lest some such mistaken impression might be fostered by a fiat overruling of the suppression doctrine cases.

Bivens v. *Six Unknown Agents,* 403 U.S. 388, 420-21 (1971) (Burger, C.J., dissenting). Respondents submit that precisely the same warning applies to a wholesale "good faith" exception.

cation of any such modification would be consistent with judicial precedents and common sense.[28]

This Court most recently in *United States* v. *Johnson*, ... U.S. ....., 102 S.Ct. 2579, 2587 (1982) enunciated the proper analysis and a "threshold test" that must be utilized under such circumstances as exist at bar when considering either a prospective or retroactive application of new constitutional guidelines. Justice Blackmun in his opinion established a system of analysis which requires an examination of three categories wherein existing precedent controls the court's decision. The three categories are as follows:

1. Whether the court's ruling is the result of an application of settled precedents to a new fact situation.

2. Whether the court's decision concerns a ruling in which there is a "clear break with the past."

3. Whether the trial court lacked the authority to either convict or punish the defendant.

The instant case does not fit into the first category because, while the facts are distinguishable, a modification of the exclusionary rule could in no way be construed as an implementation of settled legal precedent. Nor does it fit into the third category because, clearly, the trial court possessed the authority to either convict or punish the defendants.

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[28] A prospective application would apply this Court's ruling to any arrests that occur after the date of the decision. A retroactive application would mean that any modification of the exclusionary rule would apply to any arrest before the date of this Court's ruling in a case that had not yet come to final judgment.

The second category however, clearly describes any rule the Court may announce in this case. Any modification of the well-established exclusionary rule must be considered a "clear break with the past." "Where the court has expressly declared a rule of criminal procedure to be 'a clear break with the past' (citations omitted) it almost invariably has gone on to find such a newly-minded principle nonretroactive." *Id.* at 2587. *See also United States* v. *Peltier,* 422 U.S. 531, 547 n. 5 (1975) (Brennen, J., dissenting).

In *Stovall* v. *Denno,* 388 U.S. 293, 297 (1967), this Court enunciated three criteria to act as a guide where existing precedent did not control the court's determination of the prospective/retroactive issue. These are: "(a) the purpose to be served by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Presumably, any modification of the exclusionary rule would have the purpose of allowing into evidence all fruits of "reasonable-unreasonable" searches and seizures. To determine whether or not a search conducted in the past was "reasonable" would, as is developed below, place an impossible burden on an already burdened court system. *See Desist* v. *U.S.,* 394 U.S. 244 (1969). Also, as stated in *Stovall,* 388 U.S. at 300, ". . . inquiry would be handicapped by the unavailability of witnesses and dim memories." The traditional reasons supporting a finding that this Court's ruling would be nonretroactive are set out in *Johnson, supra,* and originally enunciated in *Stovall.*

> Once the court has found that the new rule was unanticipated the 2nd and 3rd *Stovall* factors—reliance

> by law enforcement authorities on the old standards and effect on the administration of justice of a retroactive application of the new rule — have virtually compelled a finding of nonretroactivity.

United States v. *Johnson*, ... U.S. ....., 102 S.Ct. 2579, 2587 (1982).

Any modification of the exclusionary rule would certainly be *contra* the great body of lower court decisions, both in federal and state courts. While some lower courts have considered a "good faith" modification of the exclusionary rule, any such modification would change an existing remedy and procedure that prosecutors, defense attorneys, law enforcement officials and judges have relied on for decades.

By sharp contrast, when this Court in *Johnson, infra,* considered the prospective/retroactive application issue in its ruling in *Payton*[29], a majority of lower courts had already anticipated the Court's eventual ruling and had acted to implement it before this court had handed down its decision[30]. Any modification of the exclusionary rule as established by *Weeks, Mapp* and their progeny which would include a "good faith" or "reasonable belief" standard would, without question, be considered a major break from the past and represent a new constitutional interpretation by this court. Therefore, any modification of the exclusionary rule can only be properly applied prospectively.

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[29] *Payton* v. *New York*, 445 U.S. 573 (1980) held that the Fourth Amendment prohibits the police from making a warrantless and non-consensual entry into a suspect's home to make a routine felony arrest.

[30] *United States* v. *Johnson*, ... U.S. ....., 102 S.Ct. at 2589 n.15 (1982).

In *United States* v. *Peltier*, 422 U.S. 531 (1975), this Court held that there would be a prospective application of the Court's ruling in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) when law enforcement agents were acting in reliance upon a federal statute supported by prior judicial approval.[21] In *Peltier* the search took place before the decision of the Supreme Court in *Almeida-Sanchez* and was on review at the time *Almeida-Sanchez* was decided. This court has consistently approved of the exclusion of evidence seized as a result of a violation of a defendant's Fourth Amendment rights. Accordingly, any departure from this longstanding practice would qualify as a break from the past sufficient to warrant only a prospective application of any modification of the exclusionary rule.

At the present time, the "good faith" or "reasonable belief" of a law enforcement agent is of no relevance in determining the admissability of evidence seized in violation of the Fourth Amendment. A retroactive application of any modification of the exclusionary rule would require countless hearings to determine the mental states of officers and the propriety of their intentions and beliefs. Such a holding would now make relevant what was irrelevant at the time of the search. This would open up a Pandora's box which would produce inaccurate, unreliable and self-serving testimony by police officers concerning what they would have been thinking had they

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[21] *Peltier* dealt with the retroactive-prospective application issue of the *Almeida-Sanchez* case, *supra*, wherein this court held that a warrantless search of an automobile conducted approximately 25 miles from the Mexican border by border patrol without probable cause violated the Fourth Amendment.

considered something that was irrelevant at the time but which the court now deems to be essential in determining the admissability of the illegally obtained evidence. As stated in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), judges and witnesses lack infallible memories and perfect records of their motivations.

Similarly, a modification of the exclusionary rule would, as Justice Blackmun stated in *Gosa* v. *Mayden* 413 U.S. 665, 673 (1973), "announce a new constitutional principle, and . . . effect[ed] a decisional change in attitude that had prevailed for many decades."[22] In *Gosa*, this Court applied prospectively the ruling of *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), which held that servicemen charged with a crime that is not "service connected" are entitled to a grand jury indictment and a trial by a civilian jury. This court went on to state that *O'Callahan* represented a clear break with the past.

Common sense also demands only a prospective application of any modification, in this case. A review of the facts in the present case illustrate but a few of the endless and insurmountable problems that would result in a retroactive application of any modification of the exclusionary rule to this or any other pending case. Because no evidentiary hearing was held, it is impossible to determine from the record, the answer to the following questions which must be asked:

1. Were there any facts learned, though absent from the affidavit, which would further militate against a finding of probable cause?

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[22] *Weeks* was decided almost 70 years ago while *Mapp* was decided more than 20 years ago.

2. Did the affiant know that probable cause did not exist (as has been the conclusion of every court of review thus far) but nonetheless ask for a search warrant?

3. Did the affiant choose to present the affidavit for the search warrant to a particular judge, *i.e.*, engage in magistrate shopping?

4. Did the police consult with a prosecutor before presenting the search warrant to Judge Lewis?

Any modification of the exclusionary rule with prospective applicability will undoubtedly result in a plethora of new procedures, hearings and inquiries. The shockwaves of such action by this Court will create havoc in the criminal justice system that will, over a period of time, produce numerous decisions by this and other courts of review before the modification would become settled within the system or eventually rescinded. Any retroactive application of a modification would multiply the above problems as well as be judicially unwise and create less confidence and a loss of integrity in the judicial process.[33]

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[33] Though again one might doubt that anything would be achieved by exclusion, that problem has already been addressed by the law on retroactivity. The Supreme Court has consistently held that new Fourth Amendment rules operate prospectively only.

I might just add to that the observation that obviously the defendant in the particular case where the new rule is established must prevail, for otherwise there would be no case or controversy and no incentive for any defendant to seek recognition of any new rule.

LaFave, *Hearings* at 330.

CONCLUSION

Because of the foregoing, Respondents respectfully urge that the decision of the Illinois Supreme Court be affirmed.

Alternatively, the Respondents urge that in light of the adequate and independent state grounds for the decision of the Illinois Supreme Court, that the petition for certiorari be dismissed as improvidently granted.

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Petitioner's Reply Brief

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IN THE

Supreme Court of the United States

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vs.

LANCE GATES AND SUSAN GATES,

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

REPLY BRIEF ON REARGUMENT

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REPLY BRIEF ON REARGUMENT

I.

DETERMINATIONS OF PROBABLE CAUSE AND OTHER FACTUAL JUDGMENTS SHOULD BE REVIEWED ON MOTIONS TO SUPPRESS UNDER A REASONABLE BASIS STANDARD

Most of the briefs filed in this case attack or defend a theory of the exclusionary rule that petitioner has not suggested. At the outset, therefore, petitioner would like to clarify the nature of the test that it is urging upon this Court.

Petitioner's proposed modification of the exclusionary rule is best understood as establishing the appropriate *standard of review* for determinations of probable cause on motions to

suppress. Petitioner proposes that such determinations should be reviewed under a reasonable basis standard, rather than *de novo*, much as jury verdicts of guilt are now reviewed under a rational basis standard on appeal and on habeas review.

As applied to the instant case the proposed standard yields a fairly simple and straightforward question for decision: Whether, based on the totality of the circumstances and judged by the factual and practical considerations of everyday life, could Judge Lewis *reasonably* conclude that Lance Gates was *probably* bringing drugs back from Florida, just as the letter predicted. Put somewhat differently the question is: Based on the totality of the circumstances in this particular case, could *any* reasonable person think that Lance Gates was probably transporting drugs?[1]

The proposal, therefore, should not be described as a "good faith" exception to the exclusionary rule. Like other standards of review, the test is objective and does not involve inquiry into subjective good faith. *See, e.g., Jackson* v. *Virginia*, 443 U. S. 307, 320 n. 13 (1979) ("Just as the standard announced today does not permit a court to make its own subjective determination of guilt or innocence, it does not require scrutiny of the reasoning process actually used by the factfinder—if known.")

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[1] A number of *amici* have argued that this is already the test that courts use to review determinations of probable cause. *See, e.g.*, Brief of National Legal Aid Defender Association at 10 ("In practice, a warrant is invalidated only if the magistrate's judgment was 'arbitrarily exercised.' *Cf., e.g., United States* v. *Giacalone*, 541 F. 2d 508, 513 (6th Cir. 1976) (*en banc*).") *See also* Brief Amicus Curiae of American Civil Liberties Union.

Petitioner agrees that some and perhaps most jurisdictions already follow the proper standard. Unfortunately, the Illinois Supreme Court did not apply the proper standard in the instant case. Its erroneous application of the exclusionary rule should therefore be corrected by this Court.

Nor would the proposal prevent courts from reaching and deciding unsettled questions of Fourth Amendment law. As with other standards of review, the proposal permits *de novo* review of questions of law.[2] Deferential review is required only for determinations of probable cause and like practical factual judgments.

Once the nature of petitioner's proposal is understood, the doctrinal differences between petitioner's theory of the exclusionary rule and the respondents' theory of the exclusionary rule become fairly small. Respondents appear to agree that practical, factual judgments should not be reviewed *de novo* on motions to suppress. They argue that this is already the law under *Hill* v. *California*, 401 U. S. 797 (1971). In *Hill*, police with probable cause to arrest one person arrested another person by mistake. This Court refused to apply the exclusionary rule because the error was reasonable and factual.

The main point of respondents' brief and those of various *amici* appears to be that determinations of law should be reviewed *de novo* on motions to suppress. Otherwise, courts could not reach and decide unsettled questions of Fourth Amendment law and, in practical effect, the Fourth Amendment would come to mean whatever the police think that it means.

Petitioner agrees that determinations of Fourth Amendment law should be reviewed *de novo* on motions to suppress. Petitioner has no quarrel with the holding of *United States* v. *Johnson*, 102 S. Ct. 2579 (1982), to that effect. In *Johnson*, federal agents erroneously concluded that an arrest could be made in a private home without an arrest warrant. Although

[2] Errors of law are not reviewed *de novo* on motions to suppress if the error concerns the meaning or constitutionality of a substantive criminal statute rather than the meaning of the Fourth Amendment. *See Michigan* v. *DeFillippo*, 443 U. S. 31 (1979). Such mistakes are treated in the same manner as errors of fact.

the mistake was reasonable, it involved a question of Fourth Amendment law and this Court held that the exclusionary rule applied. Petitioner agrees that the exclusionary rule should apply where the mistake involves a question of law.

II.

APPLICATION OF THE EXCLUSIONARY RULE IN THIS CASE DEPENDS ON WHETHER JUDGE LEWIS MADE A MISTAKE OF LAW OR A MISTAKE OF FACT

Thus, petitioner and respondents agree on general principles. We disagree as to the application of these general principles to the present case. Respondents argue that Judge Lewis erred in his determination of probable cause and that his error was neither factual nor reasonable. Petitioner does not believe that Judge Lewis made any mistakes, but that if he did, his error was both reasonable and factual.

Debate on this point is necessarily somewhat speculative at the present time. Since this Court has not yet decided the Fourth Amendment issue originally briefed and argued, neither party knows precisely what, if anything, Judge Lewis did wrong. Consequently, it is hard to join argument on the nature and effect of the putative error.

Some discussion of this point, however, is possible. Before issuing the search warrant, Judge Lewis had to consider two issues. First, Judge Lewis had to decide the legal question of the admissibility of the anonymous letter, namely, whether a detailed anonymous letter that has been corroborated by an extensive police investigation may be *considered* in a determination of probable cause or whether, on the other hand, such evidence must be totally ignored. Second, assuming that the letter could be considered, Judge Lewis had to decide the factual question of whether the facts and circumstances set forth

in the search warrant affidavit made it probable that there were drugs or drug paraphernalia in Lance Gates' car and residence.

Petitioner notes that Judge Lewis could not issue the search warrant unless he decided both issues in favor of the government. A decision that the letter could be considered and that its anonymous nature went to its weight rather than its admissibility, would not settle the factual issue of whether the facts and circumstances set forth in the search warrant affidavit established a probability of finding drugs or drug paraphernalia. Thus, both issues are in this case and both are subject to review by this Court. The proper application of the exclusionary rule depends on which issue this Court believes that Judge Lewis decided incorrectly.

The first question involves an issue of Fourth Amendment law that is susceptible to a uniform national answer and should be reviewed *de novo*. The Court should decide whether it is permissible to consider detailed and corroborated anonymous letters in determinations of probable cause. If the answer to this question is no—that such evidence must always be totally ignored, as a matter of law, no matter what the detail or corroboration—then petitioner acknowledges that the case is over and the respondents win. Judge Lewis' contrary decision on a pure question of law is entitled to no deference.[3]

The second issue, which may be reached only if this Court decides the first issue in petitioner's favor, is whether the facts and circumstances set forth in the search warrant affidavit, including the letter, made it probable that there were drugs or drug paraphernalia in Lance Gates' car and residence. On this

[3] Petitioner adheres to the view that Judge Lewis properly considered the letter and that its anonymous nature went to its weight rather than its admissibility. As the *amicus curiae* brief of the American Civil Liberties Union acknowledges, a finding of probable cause "may be based on rumors, hearsay, a suspect's prior record, or other evidence inadmissible at trial." ACLU Brief at 15-16.

question some deference to Judge Lewis is due and the issue should not be reviewed *de novo.*

III.

PROBABLE CAUSE IS A QUESTION OF FACT

The question of whether something is probably somewhere is a question of fact.[4] The query is qualitatively different from the question reviewed in *United States* v. *Johnson:* whether the Fourth Amendment requires arrest warrants for arrests in private homes. The question far more closely resembles the factual issue in *Hill* v. *California:* whether a particular person is probably the person you are looking for; or the factual issue in *People* v. *Adams,* 53 N. Y. 2d 1, 422 N. E. 2d 537 (1981), *cert. den.* 454 U. S. 854 (1981): whether a particular person lives in and has common authority over particular premises. Like the factual questions in *Hill* and *Adams* and unlike the purely legal issue in *Johnson,* the question of whether something (in this case drugs or drug paraphernalia) is probably somewhere (in this case in the trunk of Lance Gates' car and residence) requires for its resolution the classic definition of a finding of fact,

> "A finding of fact is the assertion that a phenomenom has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." Jaffe, Judicial Control of Administrative Action 548.

The question, therefore, must be judged on the basis of "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," *Brinegar* v. *United States,* 338 U. S. 160, 175 (1949), and, the

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[4] *Nathanson* v. *United States,* 290 U. S. 41 (1933) creates a limited exception to this rule. For the reasons discussed in petitioner's earlier briefs, this case is not governed by the *Nathanson* exception.

determination should be reviewed under a reasonableness standard rather than *de novo*.[5]

Respondents object to treating the question of probable cause as a question of fact. *See* Respondents' Brief at 35. Apparently, respondents believe that this Court should lay down rigid rules governing the credibility of witnesses and the inferences that may be drawn from circumstantial evidence in determinations of probable cause. These rules, respondents apparently believe, will make it possible to assess the probabilities of every situation through the automatic and mechanical application of fixed legal criteria.

Respondents' theory of probable cause is impractical; the world is far too complex. "Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation." *Adams* v. *Williams*, 407 U. S. 143, 147 (1972). "The troublesome line . . . between mere suspicion and probable cause . . . necessarily must be drawn by an act of judgment formed in the light of the particular situation and

[5] The American Civil Liberties Union expresses this same conclusion in terms of the probable cause standard itself. The ACLU notes that "The concept of probable cause as developed by this Court requires merely an objectively reasonable assessment that it is more probable than not that a search will uncover evidence of crime." ACLU Brief at 11.

The ACLU goes on to state that if a magistrate "*could* reasonably have believed that probable cause existed, then by the definition of *Draper, Brinegar* and *Aguilar*—by "the substance of all known definitions of probable cause"—probable cause was present. This is especially so since, as this Court has repeatedly made clear, the reviewing court is not to substitute its own judgment; the test is whether the initial judgment was reasonable, and significant deference is due when the initial determination was that of a magistrate." ACLU Brief at 19 (footnotes omitted).

with account taken of all the circumstances." *Brinegar* v. *United States*, 338 U. S. 160, 176 (1949).[6]

Respondents' demand for rigid rules is also anachronistic. The trend of the law in the 20th century has been away from assessing probabilities through the application of fixed legal criteria and toward giving such questions, along with all relevant evidence, to triers of fact, subject to review under a reasonableness standard. In *On Lee* v. *United States*, 343 U. S. 747 (1952), for example, a case involving evidence obtained by an informant, this Court held that the use of informants raised "not questions of law, but issues of credibility" and that, as a consequence, information learned from informants should not "as a matter of law, be refused all hearing." *Id.* at 758. This Court explained,

> "The trend of the law in recent years has been to turn away from rigid rules of incompetence, in favor of admit-

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[6] In a recent "founded suspicion" case, *United States* v. *Cortez*, 449 U. S. 411, 417-418 (1981), this Court said,

> Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. *But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account.* Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.
>
> . . .
>
> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, *practical people formulated certain commonsense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers.* Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." (emphasis added)

ting testimony and allowing the trier of fact to judge the weight to be given it." *Id.* at 757.

These principles apply with special force where, as here, the determination was made by a judge sitting without a jury. As this Court noted in *United States* v. *Matlock*, 415 U. S. 164, 175 (1974), "There is . . . much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel."

IV.

BECAUSE PROBABLE CAUSE IS A QUESTION OF FACT, DETERMINATIONS OF PROBABLE CAUSE SHOULD BE REVIEWED UNDER A REASONABLE BASIS STANDARD

Respondents complain that reviewing determinations of probable cause under a reasonableness standard would subvert the probable cause standard, make search warrants unreviewable, and undermine the integrity of the criminal process. Petitioner does not agree.

There is nothing novel about the notion that judges considering warrant applications should ask whether something is probable while judges reviewing those determinations on motions to suppress should ask whether the initial conclusion of probability was a reasonable one. "The elementary but crucial difference between burden of proof and scope of review is, of course, a commonplace in the law. The difference is most graphically illustrated in a criminal case. There the prosecution is generally required to prove the elements of the offense beyond a reasonable doubt. But if the correct burden of proof was imposed at the trial, judicial review is generally limited to ascertaining whether the evidence relied upon by the trier of

fact was of sufficient quality and substantiality to support the rationality of the judgment. In other words, an appellate court in a criminal case ordinarily does not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt, but whether the judgment is supported by substantial evidence." *Woodby* v. *Immigration & Naturalization Service,* 385 U. S. 276, 282 (1966) (footnotes omitted).

In *Jackson* v. *Virginia,* 443 U. S. 307, 319 (1979), this Court reaffirmed these basic principles, holding that the reasonable doubt standard did not mandate *de novo* review of findings of guilt. "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." (footnote omitted) (emphasis in original).

Similar standards have been used to review *ex parte* determinations of probable cause. In *Jaben* v. *United States,* 381 U. S. 214 (1965), for example, this Court upheld a criminal complaint, which, like a search warrant, involved an *ex parte* determination of probable cause, because "enough information [was] presented to the Commissioner to enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process." *Id.* at 224-225.

Indictments, like search warrants, also involve *ex parte* determinations of probable cause.[7] In *Costello* v. *United States*, 350 U. S. 359 (1956), this Court held that such determinations were unreviewable reasoning that, "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury." *Id.* at 363. In a concurring opinion, Justice Burton suggested a test more favorable to the defendant, that "if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated." *Id.* at 365 (Burton J., concurring).

Given these precedents, it is hard to see what is wrong with reviewing determinations of probable cause made in connection with the issuance of search warrants under a reasonable basis standard rather than *de novo*.

Respondents also argue that *de novo* review of search warrants is necessary to protect the integrity of the warrant process. In support of this argument, respondents advance a new theory of the warrant requirement. Respondents state that "the real function served by the warrant process is that it forces the police to make a formal record of the information upon which a search is based . . ." Respondents' Brief at 45.

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[7] Indictments involve far more serious invasions of privacy than do search warrants. A search warrant may be executed in a matter of minutes. If nothing is found, the encounter ends without stigma or serious inconvenience for the suspect. A person who has been indicted, by contrast, may spend months in jail awaiting trial, *see Gerstein* v. *Pugh*, 420 U. S. 103 (1975), where his liberties will be severely curtailed. *See Bell* v. *Wolfish*, 441 U. S. 520 (1979).

But if this were true, then the presentation of a proper warrant application to an improper magistrate would be a harmless error, a notion which this Court rejected in *Coolidge* v. *New Hampshire,* 403 U. S. 443, 449-453 (1971). Respondents' theory that the warrant process is a pro forma procedure designed merely to produce documentary evidence of probable cause is also inconsistent with the long-standing rule that failure to obtain a warrant, where one is constitutionally required, is prejudicial error "notwithstanding facts unquestionably showing probable cause." *Johnson* v. *United States,* 333 U. S. 10, 14 n. 4 (1948).

The point of the warrant requirement, as this Court's cases make clear, is to ensure, when appropriate, a judicial determination of probable cause prior to the search, when it is still possible to prevent the invasion of privacy. The magistrate's determination of probable cause prior to the search, therefore, is an important one and should not be disregarded.

V.

JUDGE LEWIS' DETERMINATION HAD A REASONABLE BASIS IN THE RECORD

As a second line of defense, respondents argue that Judge Lewis' finding of probable cause was clearly erroneous and therefore cannot withstand review even under a reasonable basis standard. In support of this claim, respondents note, for the first time in this litigation, "the plethora of obvious inquiries" that the police should have made but didn't. *See* Respondents' Brief at 24.

A number of the suggested inquiries are problematic, however. For example, respondents chastise police for not finding out "why Mrs. Gates went to Florida," Respondents' Brief at 25, and "what she did while she was there." Respondents' Brief at 41. But police did not locate Susan Gates until they followed Lance Gates to the motel where she was staying.

At that time, apparently, she was in her room. She did not emerge until the next morning when she and Lance left the motel, got into their car, and started their 23-hour drive back to Illinois. How then, were police to discover, prior to the search, why Susan Gates had been in Florida and what she had been doing there?

Respondents also condemn the police for not checking respondents' long distance telephone calls. *See* Respondents' Brief at 26. It is not clear exactly what the police could have learned from such research. Moreover, it should be noted that the investigation in this case took place in May of 1978. It was not until 1979 in *Smith* v. *Maryland*, 442 U. S. 735 (1979), that this Court held, by a vote of 5 to 3, that such investigation is legal. The police in this case should not be condemned because they declined to engage in what was, at the time, a questionable law enforcement practice.[8]

In any event, respondents' suggestions are not relevant. It is always possible to think of something else the police could have done if only their foresight, ingenuity and resources had been limitless. But that is not the test for probable cause. Rather, the question is whether the evidence that was gathered was sufficient to justify the conclusion of probability. In *Draper* v. *United States*, 358 U. S. 307 (1959), for example, the federal agents could easily have asked their informant why he thought Draper would be carrying heroin and how he had acquired his information. The federal agents did not ask these questions, but this Court nevertheless approved the arrest because the other evidence of probable cause was sufficient.

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[8] Respondents' suggestions are also inconsistent with their original theory of this case. Respondents have argued throughout this litigation that the anonymous letter was defective under *Aguilar* and that no amount of corroboration could save it. Why, then, chastise police for failing to engage in what respondents would consider pointless, futile investigation?

In *Adams* v. Williams 407 U. S. 143 (1972), an informant with no past record of reliability told a police officer (without saying how he had acquired his information) that a particular person was carrying a gun and narcotics. The police officer found the gun in the place indicated, then arrested the suspect and searched his car for narcotics.

In this Court, it was argued that the arrest was illegal because, under local law, possession of a gun was lawful if the gun was licensed and because the officer had never asked whether the suspect had a license before making the arrest. Justice Marshall argued, "It would have been a simple matter for the officer to ask whether respondent had a permit, but he chose not to do so. In making this choice, he clearly violated the Fourth Amendment." *Id.* at 161 (Marshall J., dissenting).

This Court, however, rejected this argument and held that the arrest was supported by probable cause. Respondents' theory of probable cause, then, is inconsistent with this Court's precedents.

After discussing what else the police might have done, respondents next review the actual facts of this case. There is an air of unreality to this discussion, as if common sense had been put to the side. Each fact is treated in isolation, given an innocent explanation, and then dismissed entirely. The anonymous letter could have been an elaborate fantasy or hoax. The extensive corroboration could have been a series of innocent coincidences. Lance Gates' journey to Florida and back might have had some innocent purpose. Therefore, respondents conclude, the evidence in this case did not even arguably come close to establishing probable cause under any standard. *See* Respondents' Brief at 42.

But probable cause does not mean proof beyond a reasonable doubt. Still less does it mean that every piece of evidence relied upon in a determination of probable cause must, when taken in isolation, be competent and sufficient to prove guilt at

trial. "In dealing with probable cause . . . as the very name implies, we deal with probabilities." *Brinegar* v. *United States,* 338 U. S. 160, 175 (1949). On a motion to suppress, the test is whether, based on the totality of the circumstances and judged by the factual and practical considerations of everyday life, the initial conclusion of probability was a reasonable one, that is, whether *any* reasonable person could have reached such a conclusion.

Judged by this standard, it is plain that the evidence in this case was more than sufficient to justify the conclusion that Lance Gates was probably bringing drugs from Florida, as the letter predicted. The detailed letter, which obviously came from someone with intimate and reliable information about respondents' activities, the extensive corroboration, which demonstrated the letter's veracity, and the nature of Lance Gates' journey to and from Florida, which had all the earmarks of a drug run, taken together, provided the requisite evidence. This Court has approved determinations of probable cause on much less evidence than was present here. *See, e.g., Carroll* v. *United States,* 267 U. S. 132 (1925); *Brinegar* v. *United States,* 338 U. S. 160 (1949); *Draper* v. *United States,* 358 U. S. 307 (1959); *Jaben* v. *United States,* 381 U. S. 214 (1965); and *Adams* v. *Williams,* 407 U. S. 143 (1972).

Respondents dismiss *Carroll, Brinegar,* and *Draper* as being old, *see* Respondents' Brief at 16, "dated", *see* Respondents' Brief at 35, and therefore (presumably) no longer good law. *Adams* v. *Williams,* which like the present case involved the search of a car based on corroborated informant's tip, is dismissed without discussion, apparently because the case arose from a warrantless "street encounter[ ]", Respondents' Brief at 4, whereas the instant case involves a search pursuant to a warrant.

But if the police in the instant case could have opened the trunk of Lance Gates' car without a search warrant, they should not be penalized because they acted pursuant to a warrant. The

suggested ground for distinction harks back to the common law prejudice against search warrants, which this Court laid to rest in *Jones* v. *United States*, 362 U. S. 257 (1960) and should not be revived now.

Whether judged by precedent or by common sense, Judge Lewis' conclusion that Lance Gates was probably bringing drugs back from Florida, just as the anonymous letter predicted, was, if not correct, at least a reasonable judgment[9] and should not be overturned.

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[9] The police expected to find $100,000 worth of drugs plus drug paraphernalia in respondents' residence. In this respect, they were mistaken. Police found drug paraphernalia but only a smaller quantity of drugs. This mistake, however, should not vitiate the finding of probable cause, even if, in retrospect, it now appears that the error was foreseeable. While, as a general rule, probable cause means more likely than not, in some circumstances, "[t]he phrase is less stringent that that." *United States* v. *Melvin*, 596 F. 2d 492, 495 (1st Cir. 1979). If, for example, police have probable cause to believe that a particular person possesses evidence of crime, the police may search for that evidence in any place within the suspect's control where it is reasonable to seek the evidence. *See Id.; United States* v. *Hendershot*, 614 F. 2d 648, 654 (9th Cir. 1980). *See also United States* v. *Lucarz*, 430 F. 2d 1051, 1055 (9th Cir. 1970). Thus, "the fact that a suspect has two automobiles, or two residences, does not mean that neither one of them can be searched, because the suspect may have concealed the wanted evidence in the other one." *Porter* v. *United States*, 335 F. 2d 602, 605 (9th Cir. 1964). Similarly here, it was reasonable to search respondents' residence for drugs and drug paraphernalia once the evidence established probable cause that they were drug couriers, even if the evidence as to $100,000 worth of drugs in the house did not, when viewed in retrospect, satisfy a more likely than not standard. In any event, as discussed in petitioner's opening brief on reargument, it was likely that the respondents kept drug paraphernalia in their home and the warrant also sought paraphernalia.

VI.

BECAUSE THE DETERMINATION OF PROBABLE CAUSE IN THIS CASE WAS REASONABLE AND CONSTITUTIONALLY SUFFICIENT TO WITHSTAND REVIEW, THE EXCLUSIONARY RULE SHOULD NOT APPLY

Respondents argue that the exclusionary rule does not free as many criminals as the Solicitor General suggests, and that as a result, the rule should not be modified in any way. *See* Respondents' Brief at 48-53. But the question for decision is whether the exclusionary rule is being applied in circumstances in which its application is inappropriate. If it is, as petitioner has argued, then the problem should be corrected however often it occurs.

Respondents also suggest that criticism of the present application of the exclusionary rule has undermined the moral force of the Fourth Amendment, and that as a consequence, this Court should announce that the exclusionary rule will never be modified in any substantial way. *See* Respondents' Brief at 58-62. But criticism of the exclusionary rule cannot be silenced once and forever by a pronouncement that this Court will never consider the issue. If this Court wishes to diminish criticism of the exclusionary rule, the best way is to correct the rule's occasional misapplication, as in the present case.

Respondents close by arguing that a decision in this case modifying the exclusionary rule should apply only to arrests that occur after the date of the decision and not to cases that are past arrest but still on direct review at the time of decision here. But, as this Court observed in *United States* v. *Ross*, 102 S. Ct. 2157, 2172 n. 33 (1982), "Any interest in maintaining the status quo that might be asserted by persons who may have structured their business of distributing narcotics or other illicit substances on the basis of judicial precedents clearly would not be legitimate." In any event, the applicability of the Court's

decision in the instant case to future cases is best decided in those future cases and need not be considered now.

VII.

THE DECISION OF THE ILLINOIS SUPREME COURT WAS BASED UPON THE UNITED STATES CONSTITUTION AND NOT UPON THE ILLINOIS CONSTITUTION

Respondents argue that this Court acted improvidently when it ordered reargument on the question of the exclusionary rule. Respondents note that the Illinois Supreme Court adopted the exclusionary rule in 1923, *People* v. *Brocamp*, 307 Ill. 448, 138 N. E. 728 (1923), and reason that the decision below must have rested on an independent and adequate state ground.

As petitioner has already demonstrated in its Reply Brief on the Merits on pages 13-15, the decision below was based upon decisions of this Court and not upon the Illinois Constitution. That a state court "might have, but did not, invoke state law does not foreclose jurisdiction here." *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977).

In any event, even if the Illinois Supreme Court had said that the evidence was inadmissible under the Illinois Constitution—which it did not—this Court would still have jurisdiction. The Illinois Supreme Court, in an earlier, unrelated decision, said that the exclusionary rule applied in the courts of Illinois is governed by the "constitutional standards as set forth by the United States Supreme Court." *People* v. *DeMorrow*, 59 Ill. 2d 352, 320 N. E. 2d 1, 3 (1974). In the instant case, the Illinois Supreme Court analyzed the various decisions interpreting the Federal Constitution. Therefore, even if the Illinois Supreme Court had said the evidence was inadmissible under the State Constitution—which, to repeat, it did not, this would be one of those cases like *Delaware* v. *Prouse*, 440 U. S. 648

(1979), "where 'at the very least, the [state] court felt compelled by what it understood to be federal constitutional considerations to construe ... its own law in the manner it did'." *Id.* at 653, quoting in part from *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977).

CONCLUSION

Because of the foregoing, the decision of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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OCTOBER TERM, 1982

STATE OF ILLINOIS,
Petitioner

v.

LANCE and SUSAN GATES,
Respondents

On Writ of Certiorari to the Supreme Court of Illinois

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INTEREST OF THE AMICUS CURIAE

The American Bar Association [hereinafter ABA] is a voluntary, national membership organization of the legal profession. Its nearly 300,000 members come from every state and territory and the District of Columbia. Its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges at the state and federal levels, legislators, law professors, law enforcement and corrections personnel, law students, and a number of nonlawyer "associates" in allied fields. Since its inception over 100 years ago, the ABA has taken an active interest in the improvement of the administration of justice.

In 1973, the ABA adopted a resolution supporting retention of the Fourth Amendment exclusionary rule in state and federal criminal proceedings. In the decade since, it has firmly opposed all efforts to modify or abolish the rule and allow the use of illegally seized evidence in criminal trials. Recent examples of such activity include ABA testimony submitted to the Attorney General's Task Force on Violent Crime in June, 1981, and testimony before the Senate Subcommittee on Criminal Law in November, 1981 and before the House of Representatives Subcommittee on Criminal Justice in June, 1982. In addition, during the 97th Congress the ABA frequently articulated its opposition to pending exclusionary rule legislation in communications to individual members. It has called for state and local bar association opposition to such legislation, participated in debate forums with other professional organizations, and prepared articles on the subject for publication.

The legal profession which the ABA represents has no more vital role in society than protecting constitutional freedoms. At issue in this case is a fundamental constitutional guarantee. The Fourth Amendment itself is at stake, not just a rule of evidence.

The ABA of course supports reasonable efforts to improve law enforcement. Crime is a major concern in

America today. Modification of the exclusionary rule is popularly (and politically) advocated as a panacea for this enormous societal problem. The ABA has long believed, however, that modification of the exclusionary rule as a means of dealing with crime is overly simplistic and is in fact likely to have minimal effect on either the crime rate or conviction rate nationally. The constitutional price to be paid for these marginal gains is, however, enormous. The price is the erosion of every American citizen's cherished constitutional right to privacy. It cannot be overemphasized that the issue here is not retention of a rule; it is the retention of the Fourth Amendment.

SUMMARY OF ARGUMENT

A "good faith, reasonable mistake" exception to the Fourth Amendment exclusionary rule would inevitably diminish police respect for constitutional standards and their compliance with them. It would increase the number of Fourth Amendment violations because it would appreciably increase both the opportunity and the incentive for the police to commit them. Fear that a violation of the Fourth Amendment would undermine a prosecution will be reserved for extreme constitutional violations.

Although the Court has been reluctant to expand the scope of the Fourth Amendment exclusionary rule, it has never taken the step that is now urged. It has never allowed the prosecution in a criminal trial to build its case-in-chief upon evidence that the police had seized in violation of the defendant's rights under then-prevailing Fourth Amendment law. The Court's decisions simply do not support creation of an exclusionary rule exception for so-called "reasonable" violations of the Fourth Amendment or for violations that may be deemed to have been committed in "good faith." In every instance in which the Court has concluded that expansion of the exclusionary rule would yield insignificant incremental deterrrence to police misconduct, it did so only on the assumption that tainted evidence would be excluded from the prosecution's

case-in-chief. If that assumption is eroded by a "reasonable mistake" or "good faith" exception to the exclusionary rule, the additional incentive for illegal conduct that comes from other permissible uses of the evidence will also increase, and quantities of deterrence that could once be dismissed as insubstantial will have to be remeasured. Cases such as *United States v. Calandra*, 414 U.S. 338 (1974), *United States v. Janis*, 428 U.S. 433 (1976), and *United States v. Havens*, 446 U.S. 620 (1980), could be decided differently.

Further, a "good faith" or "reasonable mistake" exception would clash with the principles governing the retroactivity of Fourth Amendment decisions, developed last term in *United States v. Johnson*, 102 S.Ct. 2579 (1982). There the Court rejected a "good faith" exception to retroactive application of Fourth Amendment decisions because such an exception would erode police respect for the Fourth Amendment itself.

The most grievous consequence of proposals to cut into the exclusionary rule woud be to undermine, perhaps irreparably, the moral authority of the Fourth Amendment. Weakening the exclusionary rule would inevitably communicate the message that the cost of Fourth Amendment compliance is too heavy for society to bear, however unintended that message might be. If the cost of doing without the fruits of illegal searches and seizures is too great, what of the cost we willingly pay whenever the Fourth Amendment deters police intrusions? Many would conclude that this too, is an unnecessary expense. Diminishing the exclusionary rule inevitably would diminish the protections against unwarranted governmental intrusions that the Fourth Amendment now extends to everyone's person, place of business, and home.[1]

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[1] The United States counts as a cost of suppression the fact that some officers, uncertain where the line between legal and illegal conduct lies, will fail to conduct searches that the Fourth Amendment in fact allows. *See* Brief for the United States at 52. This phenomenon is but the unavoidable consequence of the fact that a line must be drawn somewhere. If the police—whatever their

ARGUMENT

I. A "GOOD FAITH, REASONABLE MISTAKE" EXCEPTION TO THE EXCLUSIONARY RULE WILL NECESSARILY INCREASE THE INCIDENCE OF FOURTH AMENDMENT VIOLATIONS. THIS EXCEPTION WILL DIMINISH THE INCENTIVE OF THE POLICE TO HONOR THE LIMITATIONS THAT THE FOURTH AMENDMENT PLACES UPON THEM AND IT WILL DENY COURTS THE OPPORTUNITY TO ARTICULATE OR DEVELOP WORKABLE AND ENFORCEABLE STANDARDS FOR POLICE CONDUCT.

When in 1914 this Court in *Weeks v. United States*, 232 U.S. 383 (1914), ruled that evidence seized in violation of the Fourth Amendment would not be admitted in federal criminal trials, the Court did not base its decision upon the hope that future police misconduct might thereby be discouraged. Instead, Justice Day's opinion for a unanimous Court whose membership included such illustrious names as Justices Hughes and Holmes, stated a different rationale:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental right. (232 U.S. at 392.)

In their famous dissents in *Olmstead v. United States*, 277 U.S. 438 (1928), Justices Holmes and Brandeis elaborated on these ideas. Justice Holmes wrote:

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motivations—seek conscientiously to refrain from searching when the Fourth Amendment forbids it but to search when a search would be legal, some mistakes will inevitably be made on both sides of the line. Any effective Fourth Amendment remedy would produce the same results. What the government seeks, in reality, is a lowering of the line. It would tolerate a greater number of illegal searches so that the police would make fewer "erroneous" decisions not to search. The Fourth Amendment places too great a value on individual privacy to permit or desire this result.

> We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.
>
> For those who agree with me, no distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed. *Id.* at 470 (Holmes, J., dissenting).

In a more expansive opinion, Justice Brandeis said:

> When these unlawful acts were committed, they were crimes only of the officers individually. The Government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf. When the Government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes. And if this Court should permit the Government, by means of its officers' crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the Government itself would become a lawbreaker. *Id.* at 483 (Brandeis, J., dissenting) (citations omitted).

These and similar justifications for the exclusionary rule, which have been labeled the "judicial integrity" rationale, no longer seem to enjoy any independent existence. As interpreted in later decisions, all such considerations now appear to be subsumed within the narrower question of whether the admission of illegally obtained evidence will encourage additional law-breaking by the police. As the Court explained in *United States v. Janis*, 428 U.S. 433 (1976):

> The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the viola-

> tion is complete by the the time the evidence is presented to the court. The focus therefore must be on the question whether the admission of the evidence encourages violation of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose. *Id.* at 458-59 n. 35 (citations omitted).

Yet the need to discourage Fourth Amendment violations, whether it goes under the name of an imperative of "judicial integrity" or of "deterrence," is constitutionally based. The Fourth Amendment broadly guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. . . ." The force of its mandate is not limited to any one branch of the government to the exclusion of the others. Any governmental action that reduces the security of which the Fourth Amendment speaks is forbidden. And this security would be diminished as surely by a judicial policy admitting evidence that encourages agents of the executive branch to commit unreasonable searches and seizures as it would be by the conduct of those agents themselves. Because a "good faith, reasonable mistake" exception to the exclusionary rule would weaken the people's security by encouraging the commission of a greater number of violations of the Fourth Amendment, it must be rejected.

As this Court has said, "convincing empirical data" on the efficacy of the exclusionary rule as a prophylactic device are unlikely to be obtained. *United States v. Janis*, 428 U.S. 433, 449-53 (1976). The rule's impact must, therefore, be assessed by other means, such as by using common sense or by examining anecdotal information from knowledgeable sources.[2] Among recent information

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[2] Other judgments of equal or greater importance must frequently be made despite a similar lack of empirical proof. For example, in *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion), the Court noted that studies assessing the impact of the death penalty have yielded "no convincing empirical evidence either

of this latter sort is the testimony presented to the Criminal Law Subcommittee of the Senate Judiciary Committee by Maryland Attorney General Stephen H. Sachs. Sachs, who also served as a federal prosecutor for six years—three of them as United States Attorney for Maryland—stated that in his experience the threat of the exclusion of evidence impelled the police to learn and follow the limits established by the Fourth Amendment:

> I cannot offer statistical studies on the deterrent effect of the rule, but what I can offer is my testimony that I have watched the rule deter routinely throughout my years as a prosecutor.
>
> When an assistant U.S. attorney, for example, advises an FBI agent that he lacks probable cause to search for bank loot in a parked automobile unless he gets a better make on the car, or that he has a

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supporting or refuting" the position that the threat of execution produces no significant additional discouragement of would-be killers. *Id.* at 185. Nonetheless, the Court relied upon common sense to conclude that for many persons, "the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act." *Id.* at 185-86.

As one social scientist, who has himself conducted ultimately inconclusive studies of the exclusionary rule, recently wrote:

> Certainly we do not generally require proof of deterrent capacity as a prerequisite to adopting or retaining our public policies. There is virtually no evidence that capital punishment deters murder, but three-quarters of our states have such laws. It is painfully obvious that our laws against the use of narcotics have limited deterrent capacity. If all our court decisions had to be proven 90% effective—or 75%, or even 50%—in order to remain viable, large numbers of them would fail the test. Public policies are adopted on faith, hope and the belief that certain conduct ought to be deterred, not on the certainty that it will. Social science research is simply not advanced enough to come to very precise conclusions about the impact of most public policies—not just the exclusionary rule. Canon, "Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention," 23 S. Tex. L.J. 558, 564-65 (1982).

> staleness problem with the probable cause to believe that the ski masks used in the robbery are still in the suspect's girl-friend's apartment, or that he should apply for a search warrant form a magistrate and not rely on the consent of the suspect's kid sister to search his home—in all those circumstances, Mr. Chairman, the rule is working.
>
> The principal, perhaps the only, reasons those conversations occur is that the assistant and the agent want the search to stand up in court. . . .
>
> Exclusion from evidence is almost, certainly in my judgment, the only deterrent in the vast majority of unconstitutional instrusions. *The Exclusionary Rule Bills, 1981-82: Hearings on S. 101, S. 751 and S. 1995 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 1st and 2d Sess. 19-48, 21-22 (1981-82).

If, as the Court has consistently assumed, the exclusionary rule functions in ways similar to this description, then adoption of a "good faith" exception would undermine it. Police and prosecutors, who now are encouraged to make careful assessments of what the Fourth Amendment permits and what it forbids, would be motivated whenever there was doubt to construe the law generously in favor of the right to search and seize.[8] And

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[8] The state of Illinois appears to argue for only a comparatively modest change in the exclusionary rule, by which the court at a suppression motion would give greater deference to the determination of a magistrate who issued a warrant and would not upset the decision, even if erroneous, so long as it was "reasonable". *See* Petitioner's Brief on Reargument at 11. As Illinois appears to acknowledge, however, its real quarrel is not with the exclusionary rule itself but rather with recent decisions that it says, have reached a "hypertechnical interpretation" of the probable cause standard. *Id.* at 16. Thus Illinois suggests that this Court undertake "another, perhaps simpler, way to reach the same result" as a modification of the exclusionary rule in this case, and address the probable cause issue directly *Id.* If Illinois is correct in its claims that more recent decisions such as *Spinelli v. United States*, 393 U.S. 410 (1969), mark an unjustified departure from an earlier and more sensible view of probable cause, then its suggestion is surely well taken; the

the occasions when "doubt" could be found would surely increase as its benefits became apparent. For reasons similar to these, the Court has recognized the inadequacy of "good faith" as a standard of assessing police conduct. In *Beck v. Ohio*, 379 U.S. 89, 97 (1964), the Court said:

> We may assume that the officers acted in good faith in arresting the petitioner. But "good faith on the part of the arresting officer is not enough." *Henry v. United States*, 361 U.S. 98, 102 [1959] If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police.

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probable cause issue should be confronted directly and the exclusionary rule left alone. This is all the ABA asks in this case.

In comparison, the United States, as *amicus curiae*, urges creation of a "good faith" exception in which the offending officer's "good faith" (or "bad faith") would in fact play little or no role. Most of the time, the only question asked would be the objective question "whether a reasonably well-trained officer should have known, in light of the extant principles of law, that his conduct was prohibited." Brief for the United States at 7. Yet except to say that under this standard the evidence in this case should come in (as well as in virtually every other case where the police have acted under a warrant), the United States is remarkably reticent about how its standard would work. Its standard is an objective one, but the United States has declined to offer any description of its actual content. *Id.* at 25 n.7.

Some general observations nonetheless seem to be in order. First, to the extent that the government's standard focuses solely on the individual offending office. it ignores the fact that, as the Court recognized in *United States v. Johnson*, 102 S. Ct. 2593 (1982), the exclusionary rule must also be aimed at those who set police department policy. Second, the government's standard, open-ended as it is, assumes that "a reasonably well-trained officer," should *not* be expected to obey the Fourth Amendment. This dangerous notion ought to be rejected, and it comes at an especially inappropriate time, when the Court is adopting a more rule-oriented view of the Fourth Amendment so that search and seizure standards will be easier for the police to follow. *See United States v. Ross*, 102 S. Ct. 2157 (1982); *New York v. Belton*, 453 U.S. 454 (1981).

Coupling a "good faith" standard with the further requirement that the officer's conduct be "reasonable" would not avoid this dire prediction. And the same can be said of the proposal of the United States to employ a wholly objective "reasonableness" test. A "reasonableness" requirement either would be meaningless—since a search or seizure that is unreasonable violates the express terms of the Fourth Amendment whether the officer's faith is good or bad—or it would substitute *ad hoc* assessments of "general reasonableness" for the more exacting inquiries that the Fourth Amendment reasonableness requirement is now thought to produce. As Justice Frankfurter observed over thirty years ago in *United States v. Rabinowitz*, 339 U.S. 56, 83 (1950) (dissenting opinion), a "general reasonableness" test uninformed by specific standards against which a police officer's conduct can be measured is worth very little:

> To say that the reach must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that a "unreasonable search" is forbidden—that the search must be unreasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response. *Id.*

More recently, one commentator made a similar point, writing that an approach to the Fourth Amendment that required *ad hoc* judgments of the "reasonableness" in the raw of police actions would:

> . . . [convert] the fourth amendment into one immense Rorschach blot . . . What it means in practice is that appellate courts defer to trial courts and trial courts defer to the police. What other results should we expect? If there are no fairly clear rules telling the policeman what he may or may not do, courts are seldom going to say that what he did was unreasonable. Amsterdam, "Perspectives on the Fourth

Amendment," 58 Minn. L. Rev. 349, 393-94 (1974) (footnote omitted).

As these general points suggest, creation of a "good faith" exception would spawn new incentives for the police to overstep the bounds that the Fourth Amendment sets while at the same time crippling the courts' ability to identify and enforce those limits. An examination of how a "good faith" exception would likely operate in some recurring situations reinforces these conclusions.[4]

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[4] In support of its position that the exclusionary rule is prohibitively costly, the United States quotes extensively from a recent study of the Department of Justice's National Institute of Justice titled "The Effects of the Exclusionary Rule: A Study in California" (Dec. 1982) [hereinafter "N.I.J. study"]. *See* Brief for the United States, at 47-49. Of course evidence will be lost if the exclusionary rule is applied as it ought to be, just as evidence will be lost if the police refrain from searching when the Constitution forbids them. The paramountcy of the right to privacy requires this result. Protection of the individual often hampers "effective" law enforcement, but if the escape of some guilty persons from the net becomes too high a price to pay, then very few individual protections could survive. To mention one, the rule that no one may be convicted of a crime except on proof beyond a reasonable doubt of all elements of the offense, *see In re Winship*, 397 U.S. 358 (1970), necessarily frees some undetermined but surely large number of guilty defendants in order to minimize conviction of the innocent.

In all probability, the new N.I.J. study vastly overstated the number of guilty persons who could not be convicted unless a "good faith" exception were adopted. Most obviously, the N.I.J. study overlooked the fact that the California courts have recognized a broad vicarious standing rule under which many persons not personally aggrieved by an illegal search or seizure can nonetheless gain the benefit of exclusion. *See People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955). Under the federal exclusionary rule, of course, only the actual victim of the illegality may seek suppression. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 133-38 (1978).

Another recent study suggests that the number of cases in which the legality of a search and seizure was truly debatable, and in which the court ultimately ruled in favor of the defendant, was miniscule. *See* Davies, "Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal." 1982 A.B. Found. Res. J. 543, 613 n. 230, 616. When other types of

The instant case, in which the police executed a search warrant that is now said to have been issued without probable cause, presents one such situation. The need to regulate the conduct of the officers executing the arrest is not the only reason for retaining the exclusionary rule. A magistrate who issues a defective search warrant violates a citizen's constitutional rights as surely as the police officer who executes it. Suppression is essential to insure that police, prosecutors and magistrates do not violate the Fourth Amendment. This Court has frequently focused its attention on the conduct of the magistrate in issuing the warrant rather than on the police officer in preparing it. *See, e.g., United States v. Berkeness*, 275 U.S. 149 (1927); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931); *Grau v. United States*, 287 U.S. 124 (1932); *Sgro v. United States*, 287 U.S. 206 (1932); *Nathanson v. United States*, 290 U.S. 41 (1933); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Stanford v. Texas*, 379 U.S. 476 (1965).

The view that magistrates' decisions need not be reviewed to guarantee Fourth Amendment compliance is untenable. While magistrates and other warrant-issuing authorities in both the federal system and in many state systems no doubt possess the utmost integrity and are well-trained in the law, the potential for mistakes of judgment in issuing warrants is not eliminated, particularly in close cases. A "good faith" exception would surely encourage magistrate shopping. Some police already seek out the most sympathetic magistrates for presentation of their warrant applications. *See* L. Tiffany, D. Mc-

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appellate cases were also counted, the total number of cases in which the appellate court ruled in favor of the defense on a search and seizure issue rose to only eleven. *Id.* at 635 n. 286.

The numbers that the N.I.J. found must be compared to the General Accounting Office's finding that in thirty-eight federal prosecutors' offices, only 0.4 percent of all cases were not prosecuted due to illegal search or seizure reasons. *See* Comptroller General, U.S. GAO, Rep. No. GGD-79-45, "Impact of the Exclusionary Rule on Federal Criminal Prosecutions" 14 (1979).

Intyre & D. Rotenberg, *Detection of Crime* 120 (1967). Now, regardless of the deference the magistrate's finding of probable cause may command, *see United States v. Ventresca*, 380 U.S. 102 (1965), that determination will nonetheless be reviewed on a motion to suppress, and the advantage that the police gain by finding a lenient magistrate is therefore limited. A "good faith" exception will render this advantage decisive, if, as the United States urges, the magistrate's decision to issue a warrant becomes final and assures the admissibility of any evidence seized.

Further, there is also evidence that the warrant requirement may best protect Fourth Amendment values by forcing the police themselves (sometimes with the assistance of the prosecutors) to review the strength of their evidence before presenting their applications to the magistrate. Attorney General Sachs referred to this process. Determined to secure evidence that will survive a suppression motion, they take care to obtain probable cause before conducting their searches even if they are confident that a lesser quantum of evidence would pass a magistrate's sometimes perfunctory review. A "good faith" exception would destroy any incentive to continue this important internal review process. The police would no longer fear suppression of evidence as long as the evidence was obtained under a warrant, however erroneously issued.

A "good faith" exception could also result in making the magistrates themselves more lax. Now, the probability that the decision to issue a warrant will be scrutinized later, with the success of a criminal prosecution perhaps turning on the outcome, motivates issuing magistrates to perform more conscientiously and to become better informed on Fourth Amendment law. This goad is especially important because the Court has never held that the magistrate must be a lawyer or indeed have any legal training at all. In *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), the Court held that a non-lawyer municipal court clerk could issue valid arrest warrants for violations

of municipal ordinances. A "good faith" exception would be a disincentive to legislative efforts to upgrade the status of magistrates. A relatively uninformed magistrate could be counted on to show greater deference to the police, and the evidence acquired through such a magistrate's warrants, whether properly issued or not, would be accepted in court.

Running all of these risks in order to allow prosecutors to gain use of evidence obtained in violation of the Constitution would extract a grossly high price in lost Fourth Amendment freedoms. It has been fourteen years since this Court suppressed evidence obtained under a search warrant that a magistrate had mistakenly issued, *see Spinelli v. United States*, 393 U.S. 410 (1969), and cases of this sort seem to be rare. It is not too speculative to suggest that the reason for this trend is that the exclusionary rule is succeeding: the threat of suppression, though infrequently carried out, achieves a reasonably high rate of compliance with the Fourth Amendment mandate that warrants not be issued except on probable cause.

This point leads to another. Cases, like *Spinelli*, in which a court declares an affidavit insufficient and orders evidence suppressed typically arise when the relevant standards for assessing probable cause have not yet been fully developed, and the suppression litigation serves the critical function of permitting the articulation of these standards. The Court's decision in *Spinelli* may have resulted in the loss of evidence concerning one gambler's activities, but it permitted the Court to elucidate the test that magistrates throughout the nation should apply when deciding whether an anonymous informant's tip provides probable cause for issuance of a warrant. This norm-articulation function must continue if magistrates are to continue to strike the proper balance between law enforcement requests and Fourth Amendment restrictions. In this way, the suppression of evidence seized under a warrant issued on an inadequate affidavit in one case leads directly to clearer articulation of Fourth Amendment rights and their limitations, and hence to a prevention of

future Fourth Amendment violations. As one commentator has written:

> It is . . . imperative to have a . . . procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review. . . . Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. Chi. L. Rev. 665, 756 (1970).

The present case demonstrates the costs that will have to be paid if a "good faith" exception to the exclusionary rule is adopted that will preclude suppression of evidence seized under a warrant issued without probable cause. Certiorari was originally granted because of the importance of the issue that the affidavit here raises: whether an anonymous informant's detailed tip, corroborated as it was, established probable cause without more direct evidence of the source of the tipster's information or of his credibility. As the state of Illinois noted in its request for certiorari, the courts have divided on the question of the adequacy of similar affidavits. Petition for Certiorari at 15 (citing assertedly contrary decisions). Although the ABA expresses no view on the ultimate question of whether the warrant here was properly issued, plainly valuable guidance will result should that question be answered. The lower courts and the law enforcement community need this guidance. If the affidavit here did not make out probable cause, a definitive statement to this effect will insure that in the future magistrates will decline to issue warrants under these circumstances. Alternatively, if this affidavit is adequate, magistrates will be guided accordingly in the future.[5]

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[5] An additional unfortunate consequence of the creation of a "good faith, reasonable mistake" exception would be that, henceforth, search and seizure law would be developed under state rather than federal law. The result would be a patchwork of rules. The present case is a good illustration. When the Supreme Court of Illinois ruled that the affidavit in this case was insufficient, it relied on both federal and state grounds. The court's opinion in *People v. Gates*, 85 Ill. 2d 376, 423 N.E.2d 887 (1981), noted:

A ruling that the exclusionary rule would not apply, even if the warrant should never have been issued, would preclude decision on this important question. Because Article III, § 2 of the Constitution limits this Court's power to actual cases and controversies, and because questions of the constitutionality of another branch's conduct should be avoided when possible, the Court in this and similar cases would have to rule that the evidence should not be suppressed, and it would have to avoid the now moot question whether the Fourth Amendment was violated. Such is the clear teaching of *Bowen v. United States*, 422 U.S. 916 (1975), where the Court criticized a court of appeals for addressing the merits of a Fourth Amendment claim once it had determined that the claim could not be applied to the defendant on the basis of a retroactivity analysis. *Id.* at 920-21. The Court affirmed the court of appeals on the retroactivity point, then warned:

> This Court consistently has declined to address unsettled questions regarding the scope of decisions establishing new constitutional doctrine in cases in which it holds those decisions nonretroactive. This practice is rooted in our reluctance to decide constitutional questions unnecessarily. Because this reluctance in turn is grounded in the constitutional role of the federal courts, the district courts and courts of

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Both the Constitution of the United States (U.S. Const., amend. IV) and the Constitution of Illinois (Ill. Const. 1970, art. I, sec. 6) provide assurance against unreasonable searches and seizures of person and property. [85 Ill. 2d at 381-82, 423 N.E. 2d at 889].

Although the subsequent analysis does not expressly draw the distinction between federal and state law and indeed relies principally (but not exclusively) on federal cases, it thus appears that the decision below rested on both federal and state grounds, and indeed two dissenting justices seemed to think that this was the case. 85 Ill. 2d at 390, 423 N.E. 2d at 896 (Moran and Underwood, JJ., dissenting) (finding the search here consistent with "the United States and Illinois constitutions").

These circumstances may suggest that this case is not an appropriate vehicle for deciding any questions of federal constitutional law, *See Fox Film Corp. v. Muller*, 296 U.S. 207 (1935), *California v. Krivda*, 409 U.S. 33 (1972).

> appeals should follow our practice, when issues of both retroactivity and application of constitutional doctrine are raised, of deciding the retroactivity issue first. *Id.* at 920 (citations omitted).

A decision that an officer's "good faith" or "reasonableness" in relying on a warrant was enough to permit the contested evidence to be admitted would, like a ruling of nonretroactivity, make a ruling on the merits impossible, or at the least, readily avoidable.[6] Cases, like the instant case, could escape resolution on the merits through application of the "good faith" exception. Efficient law enforcement and individual privacy would both suffer, for magistrates would be denied authoritative guidance on whether they should issue warrants on receipt of affidavits like the one submitted here. Presumably, those magistrates who had previously refused to do so would continue in their refusal, and those who had found such affidavits sufficient would do so again. Uniform application of the Fourth Amendment would be an impossibility.

A "good faith, reasonable mistake" exception would also mean the diluting of the very aspect of Fourth Amendment protections that the framers likely deemed the most crucial for preservation of a free society—the requirement that no warrants be issued except on probable cause. Indeed, a principal objection to the proposed federal Constitution, when it was submitted to the states for ratification, was the absence of a provision expressly forbidding the central government from issuing warrants on insufficient grounds. For example, one influential critic, Elbridge Gerry, wrote in a pamphlet that was circulated at the time:

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[6] The United States asserts that the courts will retain "discretion" to decide the merits of a Fourth Amendment claim in cases where "good faith" or "reasonable mistake" is also asserted as a ground for admitting the evidence. *See* Brief for the United States, at 60-63. *Bowen v. United States*, 422 U.S. 916 (1975), and its underlying rationale, would preclude decisions on the merits when cases can be decided by applying an exclusionary rule exception.

> . . . I cannot pass over in silence the insecurity in which we are left with regard to warrants unsupported by evidence—the daring experiment of granting writs of assistance in a former arbitrary administration is not yet forgotten in the Massachusetts; nor can we be so ungrateful to the memory of the patriots who counteracted their operation, as so soon after their manly exertions to save us from such a detestable instrument of arbitrary power, to subject ourselves to the insolence of any petty revenue officer to enter our houses, search, insult, and seize at pleasure. [E. Gerry, "Observations on the New Constitution and the Federal and State Conventions" (1788), reprinted in *1 The Bill of Rights: A Documentary History* 481, 488-89 (B. Schwartz ed. 1971).]

In response to such criticism, the Fourth Amendment, with its standard of probable cause, was proposed in the First Congress under the new Constitution and was ratified by the states, in order to limit the power of magistrates to issue warrants.

Justice Frankfurter has placed the Fourth Amendment in its proper historical perspective:

> The clue to the meaning and scope of the Fourth Amendment is John Adams' characterization of Otis' argument against search by the police that "American independence was then and there born." 10 Adams, *Works* 247. One cannot wrench "unreasonable searches" from the text and context and historic content of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed "unreasonable . . . ." When the Fourth Amendment outlawed "unreasonable searches" and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity. Even a warrant cannot authorize it except when it is issued "upon probable

> cause . . . and particularly describing the place to be searched, and the persons or things to be seized. *United States v. Rabinowitz*, 339 U.S. 56, 69-70 (1950) [footnote omitted].

Yet proponents of a "good faith" exception, forgetting also this Court's reminder in *Weeks v. United States*, 232 U.S. 383 (1914), that the exclusionary rule was intended to apply to unreasonable searches by officers "acting under legislative or judicial sanction," 232 U.S. at 394, would withhold the rule virtually whenever that judicial or legislative sanction was present.

A "good faith" exception would also undermine the judiciary's ability to achieve adherence to Fourth Amendment standards when the police act with or without warrants. Consider, for example, those cases in which the police conduct—an arrest for significantly instrusive search—requires probable cause and where the issue now would be whether the police had it. A "good faith" exception, especially one resembling the proposal of the United States, would not entirely moot the question whether the police had probable cause to act but would soften it. The courts would ask if it was reasonable for the police to *think* that they had probable cause—regardless of whether they had in fact or not. Aside from the linguistic and logical complexities that would be generated by such an inquiry, the practical consequence would be to weaken the probable cause standard. Police searches and seizures that heretofore required probable cause would be tolerated upon the showing of something less, perhaps closer to the "articulable suspicion" that now only justifies less instrusive action. *See generally Terry v. Ohio*, 392 U.S. 1 (1968).

Evidence would be admitted if the police acted on probable cause, or something somewhat close to it, unless perhaps if the officer actually knew that what he was doing was constitutionally forbidden (although, in the view of the United States, the guilty knowledge of the offending officer would be irrelevant). The officer would be encouraged to search or arrest in a doubtful case rather

than show proper respect for Fourth Amendment rights. As previously mentioned, this result—the erosion of the Fourth Amendment itself—is precisely what the United States seeks. The difficult case—the case where prior court decisions do not clearly point the way—would remain doubtful indefinitely, since the courts would no longer be issuing definitive opinions stating whether or not probable cause was established in that particular case.[7] The courts would dispose of such cases by saying that the departure from the probable cause standard was at best a "good faith" mistake and not so egregious as to justify suppression.

Thus, a "good faith, reasonable mistake" exception to the rule is, in reality, an exception to the Fourth Amendment itself. Indeed, supporters of such an exception have said that this is just the point. For example, Professor Edna Ball has written a widely cited article in which she argues for adoption of a form of a "reasonable mistake" exception to the exclusionary rule. *See* Ball, "Good Faith and the Fourth Amendment: The 'Reasonable' Exception to the Exclusionary Rule," 69 J. Crim. L. & Criminology 635 (1978). The reason for her support, however, is not that she questions the ability of the exclusionary rule to induce police conformance to judicially declared standards of probable cause. Instead, she believes that the standards as they have developed are artificially strict, and she hopes that a weakened exclusionary rule will free the police from the duty of complying with them. As she explains:

> The good faith doctrine should not be judged by its effect on the exclusionary rule but by its effect upon the standards which define when citizens will be protected against governmental intrusion . . . [W]hat

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[7] Historically, the courts have been reasonably successful in developing workable tests for determining when there is and when there is not probable cause in recurring factual situations. But if the courts are not required to make this type of decision, there will be no way to sharpen the line between proper and improper police conduct.

is required is no longer "probable cause" as presently defined, but instead "a reasonable ground for belief." *Id.* 655-56.

The state of Illinois now makes a similar argument and suggests that its real quarrel is not with the exclusionary rule but instead with judicially articulated standards of probable cause that, it says, have become artificially restrictive. If indeed probable cause standards need to be reconsidered they should be reconsidered. The ABA urges, however, that this should be done directly with no illusion that what the court is doing is of lesser constitutional significance.[8]

The abolition of the exclusionary rule whenever governmental agents come armed with a warrant would result in the loss of judicial review in another important category of searches as well—administrative searches of businesses. In *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967), this Court held that administrative searches for possible code violations could not be conducted unless the inspector had advance judicial approval, and the Court set standards for issuance of administrative warrants. Again, in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) this Court reiterated the warrant's importance in assuring judicial control of the incidence and scope of regulatory searches. Since warrants are issued in *ex parte* proceedings, the weakening of the exclusionary rule would foreclose any adversarial judicial review to determine compliance with the standards in any particular case. The exclusionary

[8] A "good faith reasonable mistake" exception to the exclusionary rule would diminish Fourth Amendment protections in other ways as well. To the extent suppression of evidence under such an exception would depend upon an assessment of the offending officer's subjective state of mind, the fact-finding test would be nearly impossible and easily manipulated by the witness. If police perjury at suppression hearings is a problem now, the problem would be magnified greatly. *See United States v. Janis*, 428 U.S. 433, 447 n. 18 (1976). Further, trial judges who are unsympathetic to the exclusionary rule would be able to evade valid Fourth Amendment claims.

rule must be *retained* to insure respect for the constitutional principles articulated in these cases.

II. THIS COURT'S PRIOR DECISIONS DO NOT SUPPORT CREATION OF A NEW EXCEPTION TO THE EXCLUSIONARY RULE, APPLICABLE WHEN THE PROSECUTOR PRESENTS ITS CASE-IN-CHIEF AT THE CRIMINAL TRIAL OF THE VICTIM OF THE ILLEGAL SEARCH.

Last term when Alabama urged the adoption of "a 'good faith' exception to the exclusionary rule" in *Taylor v. Alabama*, 102 S.Ct. 2664 (1982), the Court stated that it had never previously "recognized such an exception," and it refused to do so in that case. *Id.* at 2669. In a number of decisions rendered in the past several years this Court has declined to extend the Fourth Amendment exclusionary rule. None however supports the result that the state of Illinois now seeks. Despite the occasional reference to an officer's "good faith" in decisions that have declined to broaden the rule, *see, e.g., United States v. Janis*, 428 U.S. 433, 434, 453 (1976); *United States v. Peltier*, 422 U.S. 531, 536 (1975), no prior decision supports elimination of the exclusionary rule in its core setting in criminal cases. Although the Court has expressed skepticism that significant additional deterrence could be achieved through exclusion of illegally obtained evidence in other contexts, it has consistently assumed the continued rigorous application of the exclusionary rule in the criminal trial setting. Only on this assumption could the marginal additional benefits that might be secured by expanding the rule be deemed insignificant or cost inefficient. Embarking on a course that compresses the rule raises similar concerns. Will any slight gain resulting from the exception justify the undermining of years of carefully delevoped Fourth Amendment jurisprudence that assumes the existence of the exclusionary rule in its current form?

For example, in *United States v. Calandra*, 414 U.S. 338 (1974), the Court held that a witness before a federal

grand jury was not privileged to refuse to answer questions on the ground that the questions were based upon evidence illegally seized from his office and files. The possibility that such a privilege might produce some incremental deterrence of police misconduct was, the Court reasoned, too ephemeral, since the evidence was inadmissible at trial. *Id.* at 351.

The possibility of admission of the illegally seized evidence at trial would plainly cut the ground from underneath this reasoning. If, by adoption of an amorphous "good faith" exception to the exclusionary rule, the Court now leaves open some hope for the police or prosecutors to think that such evidence could be used to obtain convictions at trial, then "[t]he incentive to disregard the requirement of the Fourth Amendment . . . to obtain an indictment" would increase correspondingly.

Similarly, the Court in *United States v. Havens*, 446 U.S. 620 (1980), declined to extend the exclusionary rule to generally ban the use of illegally seized evidence for impeachment. The prohibition against use in the case-in-chief was deemed deterrence enough against governmental lawlessness. *Harris v. New York*, 401 U.S. 222 (1971), and *Oregon v. Hass*, 420 U.S. 714 (1975).

Again, the possibility of admission of the illegally obtained evidence in the government's case-in-chief would destroy the deterrent effect of the rule, not merely modify it. The incentive afforded by the possibility that the evidence could contribute to the prosecutor's *prima facie* case, combined with the certainty that it would be available if necessary for impeachment purposes, could well lead a police officer to conduct an illegal search or seizure. The assumption underlying *Havens* that the exclusionary rule barring use of illegally obtained evidence, would no longer obtain under a "good faith" exception.

Likewise, in *United States v. Janis*, 428 U.S. 433 (1976), the Court concluded that, in a federal civil tax suit, the admissibility of evidence seized by a state law enforcement officer in violation of the Fourth Amendment

would be unlikely to encourage police illegality. The police were, after all, aware that the evidence was inadmissible in a state (or federal) criminal action; indeed, the same evidence had already been suppressed prior to Janis's trial on state charges. *Id.* at 437-38. Thus the Court concluded:

> [T]he additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation. *Id.* at 453-54 (footnote omitted).

Adoption of a "good faith" exception, applicable to the state criminal trial, would upset this calculus.[9] If the evidence could possibly be admitted in a state criminal trial inside "the offending officer's zone of primary interest" *id.* at 458, then the additional possibility of success in civil proceedings could well persuade the officer that a doubtful search was worth the candle. The "good faith exception" could immediately be perceived by law enforcement authorities as a relaxation of the restrictions of the Fourth Amendment.[10] Unfortunately, their reasoning would be correct.

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[9] The Court's opinion in *Janis* stresses that the offending officer did not serve the sovereign that became Janis's opponent in the civil tax proceeding. 428 U.S. at 455-56. The Court expressly left open the possibility that if, on remand, Janis could show federal involvement in the state officer's illegal search, then the evidence should be suppressed in the civil case. *Id.* at 456 n. 31.

[10] *Janis* plainly lends no support to the creation of a "good faith" exception that would ever allow admission of the fruits of an illegal search at the criminal trial. The "good faith" of the officer in *Janis* was deemed relevant only in regard to the far different question of whether the exclusionary rule should be extended beyond that core context to additionally prohibit admission of the evidence in a civil proceeding, involving a different sovereign. Indeed, as has already been mentioned, the *Janis* Court explicitly left open the question whether the evidence should be suppressed at that civil proceeding—despite the officer's "good faith"—if federal involvement in the search could be shown. *See supra* note 11, citing 428 U.S. at 456 n. 31.

It is also crucial that the refusal to extend the exclusionary rule to the federal tax proceedings did not prevent a court from

But the recent case that most clearly precludes creation of a "good faith" exception to the exclusionary rule is *United States v. Johnson*, 102 S.Ct. 2579 (1982). A decision allowing admission of unconstitutionally obtained evidence if the offending officer can somehow be deemed to have acted in "good faith" would necessarily repudiate the view that the Court took in *Johnson*, in regards to both the retroactivity doctrine and the deterrent function of the exclusionary rule. It would effectively overrule *Johnson's* specific holding.

The issue in *Johnson* was whether the rule of *Payton v. New York*, 445 U.S. 573 (1980)—that the police must ordinarily obtain a warrant before forcibly entering a suspect's home to make an arrest—mandated reversal of a conviction that had already been obtained but had not yet become final when *Payton* was announced. In finding *Payton* applicable, the Court recognized that *Payton* "did not simply apply settled precedent to a new set of facts," 102 S.Ct. at 2588, but instead answered a question that the Court had expressly left open in prior decisions. At the same time, however, the Court acknowledged that *Payton* had not marked " 'a clear break with the past,' " *id.* at 2589-90, quoting *Desist v. United States*, 394 U.S. 244, 248 (1969), since it overruled no prior cases and flowed from the high value that has long been assigned to the privacy of a person's home.

Nonetheless, the government, relying on language from *United States v. Peltier*, 422 U.S. 531 (1975), argued that "the only Fourth Amendment rulings worthy of retroactive application are those in which the arresting officers violated pre-existing guidelines clearly established by prior cases." *United States v. Johnson*, 102 S.Ct. at 2593. For only such rulings, the United States said, es-

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passing upon the legality of the challenged search. The search had already been found to be illegal in state criminal proceedings. 428 U.S. at 437-38. Thus, there was no risk of one of the most baneful consequences of adoption of a "good faith" exception at criminal trials—the loss of all opportunity for judicial review of the constitutionality of the search or seizure. *See supra* pp. 15-18.

tablished "settled" law, of which a police officer could be properly charged with knowledge. In substance, if not in words, this was an argument that the "good faith" of the officers should allow admission of the evidence that they acquired, even if they violated the Fourth Amendment in the process, and it is remarkably similar to the argument that the United States now makes.[11] But the *Johnson* Court rejected the argument out of hand on the ground that it would reduce the retroactivity doctrine as it applies to new Fourth Amendment rulings "to an absurdity," *id.*, at 2592 since:

> [C]ases involving simple application of clear, pre-existing Fourth Amendment guidelines raise no real questions of retroactivity at all. Literally read, the Government's theory would automatically eliminate *all* Fourth Amendment rulings from consideration for retroactive application. *Id.*

So, too, would a broader theory that would limit application of the exclusionary rule to those instances where the "bad faith" of the offending officer could be shown, since such a showing could rarely, if ever, be made if there was no "settled" rule in existence at the time of the contested search.[12]

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[11] In its brief to this Court in *Johnson*, 102 S. Ct. 2579 (1982), the United States expressed its support for "a general and relatively broad 'good faith' exception" to the Fourth Amendment exclusionary rule. However, it declined to ask the Court to adopt such an exception in that case on the ground that the narrower retroactivity theory that it tendered, and that the court ultimately rejected, should suffice to require admission of the evidence that the court of appeals had ordered suppressed. *United States v. Johnson, supra*, Brief for Petitioner at 15 n. 7. It appears, however, that the United States in that case conceived its retroactivity theory as a corollary to the broader "good faith" exception, and, indeed, despite its disclaimer the government stressed the officers' asserted "good faith" as a reason to admit the evidence. *Id.* at 28 n. 15.

[12] Of course, a "good faith" exception to the exclusionary rule would be altogether inconsistent with another important facet of the retroactivity doctrine—the principle that the defendant who first successfully presses a novel Fourth Amendment claim receives

The *Johnson* Court also rejected the government's argument that application of the *Payton* rule would not serve the policy of deterring police illegality. The Court noted:

> If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be non-retroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question. Failure to accord *any* retroactive effect to Fourth Amendment rulings would "encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach." *Id.* at 2593-94, quoting *Desist v. United States*, 394 U.S. at 277 (Fortas, J., dissenting) (footnote omitted).

The same criticism may be leveled with even greater force against a "good faith" exception. An exclusionary rule exception of this sort would encourage officers to err on the side of conducting potentially unconstitutional searches and seizures even when "settled precedents" need only be applied "to new and different factual situations,"

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the benefit of the new ruling. Thus, Payton's right to the benefit of the rule announced in his case was unchallenged, *Payton v. New York*, 445 U.S. 573 (1980), and, indeed, the rule of *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973)—which was held non-retroactive in *United States v. Peltier*, 422 U.S. 531 (1982)—was applied to reverse Almeida-Sanchez's conviction. As is discussed above, it is necessary to apply such new rules in the cases where they are first developed if the vitally important process development of Fourth Amendment standards is to continue. Yet the announcement that evidence will henceforth be admitted if the officer can be said to have acted in "good faith" will bring this process to a grinding halt; cases like *Payton* and *Almeida-Sanchez* will no longer be decided.

United States v. Johnson, 102 S.Ct. at 2587. The police would then have ample cause to hope that even if they guessed wrong a sympathetic court would later rule that they were close enough to the mark and admit the evidence. Police administrators would have no incentive to develop officers' ability to distinguish constitutional from unconstitutional behavior, preferring the officer who aggressively pushes the Fourth Amendment to its limits and beyond, to the one who errs on the side of caution. And if, as the United States proposes, a wholly objective standard is adopted, the fruits of willful, deliberate Fourth Amendment violations will become admissible. In either form—with or without a subjective component—a "good faith, reasonable mistake" exception is fatally deficient.

Thus, this Court's prior decisions lend no material support to the project of minting a "good faith" exception to the exclusionary rule. To the contrary, adoption of such an exception would necessitate reconsideration of many difficult problems that had been laid to rest and would result in the repudiation of large bodies of decisional law in such important areas as that of retroactivity.[13]

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[13] *See* Mertens & Wasserstrom, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," 70 Geo. L.J. 365, 432-43 (1981). Among other important decisions that could never have been rendered if a "good faith" exception had been in place are: *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Torres v. Puerto Rico*, 442 U.S. 465 (1979); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Chimel v. California*, 395 U.S. 752 (1969); *Katz v. United States*, 389 U.S. 347 (1967). In each, a plausible claim that the officer's transgression was not committed in "bad faith" would doubtless have been made because the search or seizure found support in statute (*Ybarra* and *Torres*), because it was part of an apparently routine practice that had not been specifically condemned (*Prouse*), or indeed because it found sanction in earlier decisions of the Court (*Katz* and *Chimel*). Yet the importance of these decisions for the development of Fourth Amendment norms and hence for the protection of Fourth Amendment values can hardly be questioned.

III. A "GOOD FAITH, REASONABLE MISTAKE" EXCEPTION TO THE EXCLUSIONARY RULE WOULD WEAKEN RESPECT FOR THE FOURTH AMENDMENT BY CALLING FUNDAMENTAL CONSTITUTIONAL VALUES INTO QUESTION.

Adoption of a "good faith" exception would also impose costs of a higher order. There is, for example, evidence that the police are deterred by the exclusionary rule and not because illegal searches and seizures are themselves wrong. *See, e.g.*, Loewenthal, "Evaluating the Exclusionary Rule in Search and Seizure," 49 U. Mo. K.C.L. Rev. 24, 29 (1980) ("[T]o police, the imposition of the exclusionary rule is a prerequisite for the imposition of a legal obligation."). Permitting more illegally obtained evidence to be used in court will inevitably weaken the belief that Fourth Amendment violations are inherently wrong and they should be avoided for reasons independent of later tactical advantages or disadvantages at trial. Similar reasoning is central in the criminal law. We do not punish criminals only to restrain or deter them and others by fear of further punishment. We do so also in order to reaffirm the moral validity of society's norms, as expressed in its criminal law, so that the law will be obeyed because of a shared perception that obedience is the right thing to do. As Herbert Packer wrote:

> . . . It is not simply the threat of punishment or its actual imposition that contributes to the total deterrent effect (of the criminal law) but the entire criminal process, standing as a paradigm of good and evil, in which we are reminded by devices far more subtle than literal threats that the wicked do not flourish. These public rituals, it is plausible to suppose, strengthen the identification of the majority with a value-system that places a premium on law-abiding behavior. H. Packer, *The Limits of the Criminal Sanction* 44 (1968).

By weakening similar identification with the values of the Fourth Amendment, adoption of a "good faith" exception

will undoubtedly increase the frequency of Fourth Amendment violations.[14]

The creation of a "good faith" exception will also surely be interpreted as a statement that the criminal justice system can no longer stand the cost of excluding evidence of guilt, even if the evidence was obtained in violation of Fourth Amendment rights. It is but a small step from this position to the dangerous view that we can no longer bear the cost of police compliance with constitutional standards. If the police arrest a suspect without probable cause and, as a result, obtain incriminating evidence, suppression of that evidence exacts a cost. But it is precisely the same cost that we would have paid, though less directly, had the police respected the suspect's rights. If they had not made their arrest, the evidence would have been lost to the criminal justice system since it would not have been obtained in the first place. If suppression imposes too heavy a price for us to bear, then so perhaps does observance of the limits that the Constitution places upon law enforcement. Such a message, however unintended, would surely be conveyed if so-called "reasonable" violations of the Fourth Amendment could yield evidence admissible in court.

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[14] To be sure, the exclusion of evidence will sometimes frustrate the ability of the criminal justice system to punish those who have committed crimes, and in those instances the process of group identification with the norms of the criminal law that Packer described will not take place. Yet these instances themselves teach an important lesson: that we must sometimes sacrifice efficiency in law enforcement if we are to safeguard our civil liberties.

CONCLUSION

For the foregoing reasons, the American Bar Association respectfully submits that this Court should decline to accept a good faith or reasonableness exception to the Fourth Amendment exclusionary rule.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF ILLINOIS,

Petitioner,

—v.—

LANCE and SUSAN GATES,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, AS *AMICI CURIAE*

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members, and the ACLU of Illinois is one of its state affiliates, dedicated to preserving and protecting the liberties safeguarded by the Constitution and its Bill of Rights. The prohibitions against unreasonable searches and seizures embodied in the Fourth Amendment are critically important among those safeguards. They belong, as Justice Jackson forcefully observed after his return to the Court in 1948, "in the catalog of indispensible freedoms." Brinegar v. United States, 338 U.S. 160, 180 (1948) (dissenting opinion).

The American Civil Liberties Union has participated in many of the leading decisions by which this Court has given

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1. A letter consenting to the filing of this brief has been lodged with the Clerk.

shape and life to the Fourth Amendment's guarantee. Indeed, the ACLU filed the only brief before the Court in Mapp v. Ohio urging application of the exclusionary rule to the states, and was invited by the Court to raise the point at oral argument. 367 U.S. 643, 646 n.3 (1961). We appear here amici curiae because, in light of the order requesting reargument, this case now appears to present the most serious risk faced by Americans in recent years to the preservation of the Fourth Amendment as a real barrier to unconstitutional searches and seizures.

In the view of amici, any question concerning good faith defense is not properly before the Court, not only for the reasons set forth by Justice Stevens dissenting to the order for reargument, but also for the reason, advanced by respondents, that Illinois adopted the exclusionary rule as a matter of

state law in 1923 and stoutly adhered to it again after Wolf v. Colorado, 338 U.S. 25 (1948). See Elkins v. United States, 364 U.S. 206, 226 (1960)(citing Illinois cases). Should the Court reach the question, however, we hope that the analysis presented here -- demonstrating that in probable cause cases the good faith exception would be either redundant to the probable cause standard, or an impermissible substantive dilution of heretofore unchallenged standards of probable cause -- will be of assistance to the Court, and to the Fourth Amendment which protects us all.

SUMMARY OF ARGUMENT

A magistrate may issue a warrant where the facts presented to him, reasonably credited by officers, would justify a prudent person in believing that a search would probable be fruitful. Since probable cause is not defeated by reasonable errors of fact, e.g., United States v. Robinson, 414 U.S. 218 (1973) or of law, Michigan v. DeFillippo, 443 U.S. 31 (1979), an objective good faith exception would be wholly redundant in cases where the only claimed violation was of the substantive probable cause standard.

Illinois appears to recognize the congruence of probable cause and a good faith exception, and properly urges the Court to decide this case without reaching a good faith standard. If a good faith exception were broader than probable cause, as suggested by the United States, that lesser standard would become the sub-

stantive measure of Fourth Amendment protection, since exclusion is the only means available for giving life to the probable cause standard. Damage suits and injunctive suits are unavailable; and Article III would bar a court upholding admission through a good faith exception from going on to decide the Fourth Amendment issue. E.g., Bowen v. United States, 422 U.S. 916 (1975); DeFunis v. Odegaard, 416 U.S. 312 (1974).

This Court -- unanimously in Weeks v. United States and Olmstead v. United States, and again in Mapp v. Ohio -- has held that the Fourth Amendment itself, and imperatives of judicial integrity, forbid introduction at trial of evidence illegally seized from a defendant. The illegal search and seizure is inescapably part of a larger evidentiary transaction for which it was undertaken; and the Courts may not insulate themselves from the entire illegality --

the illegal acquisition of evidence for use at trial -- of which they are inevitably a part.

Even when viewed under a cost-benefit analysis, exclusion when good faith is present is essential. The costs incurred by exclusion are only the costs the framers decided to impose under the Fourth Amendment were it obeyed. The benefits are the systemic deterrence afforded whenever this Court announces a Fourth Amendment rule, and police departments thereupon disseminate it to officers throughout the field through training, and continuing education. A good faith exception would nearly always be applicable in close cases, cases resolving previously unsettled issues, or cases reversing prior decisions; and it is precisely in those cases, where the opportunity to determine law is available only through application of the exclusionary rule, where systemic deterrence has

its greatest effect.

A good faith exception would signal a departure from the Court's reliance on categorical rules and bright lines and would return the Court instead to the discredited, unguided reasonableness approach of United States v. Rabinowitz, 339 U.S. 56 (1950). By focussing attention not on the legality of searches but on the reasonableness of belief in their legality, it would have prevented adjudication of some of this Court's most important recent Fourth Amendment precedents, e.g., Torres v. Puerto Rico, 442 U.S. 465 (1979) and Ybarra v. Illinois, 444 U.S. 85 (1980).

Even if the "costs" of enforcing the Fourth Amendment are relevant, the statistical data relied on by the United States, largely erroneous, interested, and irrelevant, is wholly incapable of justifying adoption of a good faith exception. Moreover, such an exception

would place a heavy premium on police ignorance, and would predictably lead to a deterioration of police training and in-service education programs regarding Fourth Amendment standards.

INTRODUCTORY STATEMENT

The Fourth Amendment is an exclusionary rule. It embodies a judgment that a free society is best served by preventing the police from acquiring certain relevant evidence, even at the cost of unprosecuted crime. Thus, every case in which evidence is suppressed because it was gathered in violation of the Fourth Amendment is one in which the founders had already determined that government should have foregone access to that information in the first place.[2] The exclusionary rule merely provides specific performance of the will of the founders.

In a perfect world, all officials

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2. See, e.g., United States v. Rabinowitz, 339 U.S. 56, 67-68 (1950)(Black, J., dissenting)("the framers of the Fourth Amendment must have concluded that reasonably strict search and seizure requirements were not too costly a price to pay ...."); Mincey v. Arizona, 437 U.S. 385, 393 (1978). See also Appendix A, infra (contemporary response to Dean Wigmore's criticism of Weeks v. United States, 232 U.S. 383 (1914)).

would voluntarily comply with the requirements of the Fourth Amendment. In our imperfect world, however, courts must confront evidence which the government should not have seized, either because probable cause was not present, or because the procedural and/or operational requirements of the Fourth Amendment were not complied with. In this case, defendant argues that a magistrate misapplied the substantive probable cause test and issued a search warrant even though the requisite degree of probability was not present.[3]

The narrow issue on reargument is whether the evidence may be used, regardless of whether or not the magistrate

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3. The issues raised by a good faith exception where, as here, only the substantive probable cause requirement is at issue may differ significantly from the issues posed in cases involving the procedural and/or operational requirements of the Fourth Amendment. For a discussion of the latter, see Mertens & Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo.L.J. 365, 454-57 (1981).

wrongly decided the Fourth Amendment issue, if both the magistrate and the police acted reasonably in believing that probable cause was present. However, where, as here, the sole issue before the Court is the substantive reach of the concept of probable cause codified in the Fourth Amendment, it is meaningless to speak of an objective good faith error in applying substantive Fourth Amendment standards. The concept of probable cause as developed by this Court requires merely an objectively reasonable assessment that it is more probable than not that a search will uncover evidence of crime.[4] Such an objectively reasonable assessment is precisely the

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4. "Probable cause exists 'where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been committed."

Brinegar v. United States, 388 U.S. at 175-76 (quoting Carroll v. United States, 267 U.S. 132-165 (1925)).

standard suggested by both Illinois and the Solicitor General as defining the scope of a suggested objective good faith defense. Given the virtual identity between probable cause as it has been defined by this Court and the concept of an objective good faith defense which is the centerpiece of the Solicitor General's brief, a finding that objective good faith existed is the functional equivalent of a finding that probable cause, in fact, existed. If, on the other hand, the Solicitor General's concept of objective reasonableness requires a lower threshold of probability than traditional conceptions of probable cause, he is arguing not for a good faith defense, but for a substantive dilution in the definition of the degree of probability required by the Fourth Amendment. In place of the traditional test of probable cause defined as an objectively reasonable assessment

that it is more likely than not that evidence of crime will be obtained, the Solicitor General would substitute a test of objectively reasonable belief that an objectively reasonable probability existed -- an exercise in linguistic reductionism leading to the inevitable dilution of the substantive meaning of probable cause.

I. THE FOURTH AMENDMENT'S PROBABLE CAUSE STANDARD ALREADY AFFORDS LAW ENFORCEMENT OFFICERS THE SCOPE FOR OBJECTIVELY REASONABLE ERRORS WHICH COULD CONSTITUTIONALLY BE PROVIDED BY A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

By authorizing search where law enforcement officers reasonably believe and a magistrate reasonably determines that evidence of crime is likely to be found

in a particular place, the probable cause standard already affords precisely the scope for errors of fact and law which proponents of a good faith exception claim is necessary. Petitioner Illinois concedes as much, and quite correctly urges that this case can and should be decided under traditional probable cause standards, recognizing that adoption of a good faith exception for cases like this is unnecessary because redundant.[5] If a good faith exception were broader -- as broad as that apparently sought by the Solicitor General, who seems to urge that the seizure of evidence pursuant to a warrant renders such evidence admissible at trial even if the magistrate lacked probable cause[6] -- it would effectively eliminate the requirement at the historical heart of the Fourth Amendment -- that "no warrants shall is-

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5. See Petitioner's Brief for Reargument (hereafter "Pet. Supp. Br.") 19; see also n.15 infra.

6. See Supplemental Brief for the United States (hereafter "U.S. Supp. Br.") 43-44.

sue, but upon probable cause".

A. The Fourth Amendment Requires Only Probable Cause, Not Certainty, And Is Not Defeated By Reasonable Errors Of Fact Or Of Law.

A search warrant is valid if, on the basis of facts officers reasonably believed to be true,[7] a magistrate reasonably determined that a prudent person would be justified in believing that a search would yield either contraband or the fruits, instrumentalities, or evidence of a crime.[8] Certainty is not required; the likelihood of engaging in a fruitful search must only be more probable than not, and may be based on rumors, hearsay, a suspect's prior record, or other evidence inadmis-

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7. Franks v. Delaware, 438 U.S. 154 (1978).

8. The critical judgment, of course, is the magistrate's, not the officer's. See, e.g., United States v. United States District Court, 407 U.S. 297, 316 (1972); Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971); Whitely v. Warden, 401 U.S. 560 (1971). See also infra at 21-23.

sible at trial.[9]

As this Court's cases demonstrate, this standard expressly provides scope for reasonable errors of fact and of law. Probable cause is not defeated if the "facts" which the officers present to the magistrate turn out to be inaccurate (so long as the officers themselves reasonably credit those facts), or if the assessment that a search would produce evidence of crime turns out to have been misjudged.[10] Similarly, probable cause does not dissipate because a substantive criminal statute is

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9. See, e.g., United States v. Ventresca, 380 U.S. 102, 107-09 (1965); Draper v. United States, 358 U.S. 307 (1959); Aguilar v. Texas, 378 U.S. 108 (1964); Hill v. California, 401 U.S. 797 (1971); cf. Brinegar v. United States, 338 U.S. at 172-77.

10. See, e.g., Franks v. Delaware, 438 U.S. at 165; United States v. Robinson, 414 U.S. 218 (1973); Draper v. United States, supra; cf. New York v. Adams, 53 N.Y.2d 1, 443 N.E.2d 537, 439 N.Y.2d 877 (1981); United States v. Matlock, 415 U.S. 164 (1974).

later construed differently or held unconstitutional.[11] So long as the magistrate reasonably determines that a search will be fruitful -- whether or not the information he bases his determination on is accurate, and whether or not a crime has even been committed -- there is no Fourth Amendment violation and evidence seized in a search pursuant to the warrant is admissible.

B. In Ruling On A Suppression Motion Challenging Search Pursuant To A Warrant As Lacking Probable Cause, The Question Which Proponents Of An Objective Good Faith Exception To The Exclusionary Rule Would Make Determinative -- Did The Magistrate Reasonably Assess The Existence Of Probable Cause -- Is Precisely The Same As Asking Whether Probable Cause Existed.

Where, as here, the only alleged Fourth Amendment violation is the deter-

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11. Michigan v. DeFillippo, 443 U.S. 31, 37-38 (1979).

mination of probable cause, a good faith exception to the exclusionary rule would be wholly redundant.

If the facts presented to the magistrate would warrant a good faith, reasonable belief that the search comports with the Fourth Amendment, then the probable cause standard has been met.[12] If, on subsequent review, a court determines that probable cause (defined by this Court as an objectively reasonable assessment of probability) was not present, it necessarily follows that the assessment of probable cause was objectively unreasonable. To go further, and ask whether even though probable cause was not present, a magi-

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12. Like the United States, we assume that inquiry under the good faith exception which this Court requested supplemental briefing to explore would emphasize objective reasonableness, see U.S. Supp. Br. 58 n.39; see also Scott v. United States, 436 U.S. 128, 135-36 (1978), although subjective belief is necessarily an element to some extent as well. E.g., Franks v. Delaware, 448 U.S. at 164-65.

strate (or even the presenting officers) could reasonably have believed it was present, makes no sense: if they could reasonably have believed that probable cause existed, then by the definition of Draper, Brinegar and Aguilar -- by "the substance of all known definitions of probable cause"[13] -- probable cause was present.[14] This is especially so since, as this Court has repeatedly made clear, the reviewing court is not to substitute its own judgment; the test is whether the initial judgment was reasonable, and significant deference is due when the initial determination was that of a magistrate. United States v. Ventresca, 380 U.S. at 108;

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13. Brinegar v. United States, 338 U.S. at 175.

14. This point has been made, in a different context, by Judge Jon Newman. See Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Remedy for Law Enforcer's Misconduct, 87 Yale L.J. 447, 460 (1978).

Aguilar v. Texas, 378 U.S. at 110-11; United States v. Jones, 362 U.S. 257, 270-71 (1960).

To its credit, Illinois appears to recognize the identity between probable cause and a good faith exception.[15] The

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15. See, e.g., Pet. Supp. Br. 11-13 ("at least in the area of probable cause and similar factual questions ... so long as the officer's or magistrate's error was a reasonable one, the exclusionary rule should not be applied"); Pet. Supp. Br. 19 ("As a practical matter, it may not make much difference, at least in the area of probable cause, whether this Court adopts the modification of the exclusionary rule ... or decides this case on the basis of the traditional Carroll-Brinegar-Jones standard of probable cause); Pet. Supp. Br. 26 ("[T]he proposed modification of the exclusionary rule is, in essence, a return to the traditional standard of probable cause"); see also id. 16-19.

Perhaps because the position urged here by amicus (and on which petitioner's brief on reargument is premised) might be thought unresponsive to the question this Court ordered the parties to rebrief, in portions of its brief Illinois essays an unconvincing "good faith exception" that would differ from probable cause. Thus, petitioner's submission that "Judge Lewis' assessment of the probabilities was a reasonable one, even assuming arguendo that it was mistaken", Pet. Br. 27, is meaningless. If the assessment was reasonable, it was not "mistaken" within the meaning of this Court's practical approach to probable cause exemplified by Brinegar and Ventresca.

good faith exception proposed by the United States may differ from the probable cause standard, since it appears to focus solely on the officers, rather than the magistrate, and seems to insulate evidence seized pursuant to a warrant from suppression, even when the magistrate could not have reasonably determined that probable cause existed. See U.S. Supp. Br. 43.[16] Exclusive atten-

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16. We are told that exclusion may nevertheless be appropriate where "the factors relied on by the magistrate were so lacking in the indicia of probable cause as to render official belief in its existence entirely unreasonable," quoting Brown v. Illinois, 422 U.S. at 610-611 (Powell, J., concurring), but the line between after-the-fact reasonableness under Aguilar, 378 U.S. at 111, and "entirely unreasonable" is left quite uncertain. Professor Kaplan, on whom the United States heavily relies, has criticized a similarly unclear standard under which an unreasonable determination of probable cause would not bar admissibility so long as it was not "reckless" or "deliberate". Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L. Rev. 1027, 1044-45 (1974).

tion to the officers' judgment rather than the magistrate's, however, is squarely inconsistent with the core Fourth Amendment requirement that a magistrate's objectively reasonable judgment of probable cause -- not merely his signature, not his incorrect assessment of probable cause, and not an officer's belief that probable cause exists -- is the fundamental prerequisite for most lawful searches. See, e.g., Nathanson v. United States, 290 U.S. 41 (1933) and Franks v. Delaware, supra (rejecting proposition that magistrate's signature on warrant sufficient to establish valid search); Ybarra v. Illinois, 444 U.S. 85 (1979) and Torres v. Puerto Rico, 442 U.S. 465 (1979)(undoubted good faith of police searching under clear statutory authority irrelevant where probable cause is lacking); Delaware v. Prouse, 440 U.S. 648 (1979) and Dunaway v. New York, 442 U.S. 200 (1979)(undoubted

good faith of officers acting pursuant to state court determinations that the particular searches at issue did not require probable cause irrelevant where appropriate substantive standard not met); Whitely v. Warden, supra (officer's belief that valid warrant issued irrelevant where magistrate could not properly have found probable cause).[17]

As we now show in greater detail, the good faith exception proposed by the United States, if broader than the probable cause standard, has precisely the vice this Court found in each of these cases: it would "denude the probable cause requirement of all real meaning." Franks v. Delaware, 438 U.S. at 168.

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17. The failure of the United States to discuss any of these cases except Franks -- each of which would have been decided differently under its approach -- is striking.

C. If A Good Faith Exception Would Afford Any Broader Scope For Error Than Probable Cause, It Would Violate The Fourth Amendment By Systematically Failing To Deter And Indeed Inducing Searches On Warrants Absent Probable Cause.

Law is what law does. A rule of law, especially a constitutional rule, which finds no sanction, and which need not be applied in the courts even in appropriate cases, is empty rhetoric. Davis v. Passman, 442 U.S. 228, 242 (1979).[18] To say that the Constitution forbids search warrants to issue on less than probable cause, but permits the admission of evidence seized when probable cause was lacking, is effectively to protect "the right of the people to be secure" only procedurally, through search warrants, but without the sub-

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18. "[U]nless such rights are to become merely precatory, the class of litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for [their] protection .... " Id.

stantive protection of probable cause. Nathanson v. United States, supra; Aguilar v. Texas, supra; Franks v. Delaware, supra.

One need look only so far as the history of the Fourth Amendment in states without exclusionary rules between Wolf and Mapp to demonstrate the truth of these observations. Commentators, state courts, and ultimately this Court found the tension between the "right" enunciated in Wolf and its utter meaninglessness unbearable. See generally Traynor, Mapp v. Ohio at Large in the Fifty States, 1962 Duke L.J. 319, 323-24 (prior to Mapp, Fourteenth Amendment search and seizure guarantees were not protected by states); Elkins v. United States, 364 U.S. 206, 224-32 (1960) (listing post-Wolf state court decisions on admissibility of unlawfully seized evidence); People v. Cahan, 44 Cal.2d 434, 445, 282 P.2d 905, 911 (1955)(Traynor, J.). Leading law enforcement authorities

throughout the nation reacted to Mapp as if the Supreme Court had suddenly created the probable cause and warrant requirements, rather than merely enforced rules applicable to the states all along.[19]

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19. Commissioner Michael Murphy of New York observed:

> I can think of no decisions in recent times in the field of law enforcement which had such a dramatic and traumatic effect as this .... I was immediately caught up in the entire program of reevaluating our procedures which had followed the DeFore rule, and modifying, amending, and creating new policies and new instructions for the implementation of Mapp .... Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen.

Kamisar, Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?", 62 Jud. 66, 72 (1978)(quoting Murphy, Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments, 44 Texas L.Rev. 939, 941 (1966)). Similarly, when the California Supreme Court adopted the exclusionary rule, Los Angeles Police Chief William Parker bitterly attacked it for prohibiting "affirmative action" by the police against crime until and unless police possess "sufficient information to constitute probable cause". Nevertheless, mistaking the newly-applicable exclusionary rule for the substantive guarantee which had theoretically, but not in reality, long been law in California, Chief Parker continued:

If evidence seized under warrants based on less than probable cause were admissible, that lesser standard would quickly measure the substantive protection afforded by the Fourth Amendment. Contrary to the suggestion that exclusion of evidence seized pursuant to an erroneous and, by definition, unreasonable judicial determination of probable cause is "irrational" (U.S. Supp. Br. 37), exclusion is essential because it is the only means for giving life to the probable cause standard.[20] Damage suits are

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> [a]s long as the exclusionary rule is the law of California, your police will respect it and operate to the best of their ability within the framework of limitations imposed by that rule.

Id. (quoting W. Parker, Police 117, 131 (emphasis added). See also id. at 70-72 (similar experience in Minnesota); Kamisar, The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than "An Empty Blessing", 62 Judicature 337, 349 (1979)(New York).

20. As pointed out supra at 9-13, had the Fourth Amendment been complied with, of course, the evidence would also have been "excluded". Although

impossible because the warrant-issuing magistrate is immune from suit, Stump v. Sparkman, 435 U.S. 349, 363 n.12 (1978), and the officers searching pursuant to a warrant normally have a secure good-faith defense. United States v. Ross, 72 L.Ed. 2d 572, 593 n.32. Injunctive relief is similarly barred. See Brinegar v. United States, 338 U.S. at 182 (Jackson, J., dissenting); Rizzo v. Goode, 423 U.S. 362 (1976). Nor could a court, consistent with Article III of the Constitution, rule on the legality of the warrant where the

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the United States criticizes application of the exclusionary rule in cases such as Coolidge v. New Hampshire, 403 U.S. 443 (1971), agreeing with Justice Harlan that nothing in Coolidge touched on "core" Fourth Amendment values, id. at 491, that very criticism suggests the need to apply the exclusionary rule at least where, as here, such "core" values are implicated. With good historical reason, see, e.g., Lasson, History and Development of the Fourth Amendment to the United States Constitution, 35-36, 47, 100-03 (1937); T. Taylor, Two Studies in Constitutional Interpretation, 23-46 (1969), the Court has long found the probable cause standard the heart, the "minimum requirement" of the Fourth Amendment, Chambers v. Maroney, 399 U.S. 42, 51 (1970). See also United States v. Ross, 72 L.Ed.2d at 583-84.

good faith standard was made out, the surprising suggestion of the United States (Supp. Br. 61-62) not to the contrary. See, e.g., Bowen v. United States, 422 U.S. 916 (1975)(criticizing Ninth Circuit on Article III grounds for ruling on illegality of a search when decision on retroactivity of Almeida-Sanchez v. United States, 413 U.S. 916 (1975) made constitutional ruling unncessary); Defunis v. Odegaard, 416 U.S. 312, 316 (1974)("federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them"); Stovall v. Denno, 388 U.S. 298, 301 (1967)(Article III precludes announcing rule of law purely prospectively without application to case in which rule is announced).[21] Finally, reliance on the

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21. The Court has declined to determine the constitutionality of judicial or executive action where official immunity or a good faith defense has precluded relief. See, e.g., Procunier v.

magistrate's assessment alone, without possibility of judicial review (or with review available only in outrageous cases, see U.S. Supp. Br. 43-44) could not long maintain current substantive standards of probable cause as a bulwark against unconstitutional searches and seizures, as this Court has recently recognized, Franks v. Delaware, supra.[22] Since a principal

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Navarette, 434 U.S. 555, 566 n.14 (1978); Stump v. Sparkman, supra.

Even assuming arguendo that a court admitting evidence pursuant to a good faith exception could go further and measure the magistrate's determination against the probable cause standard as well, moreover, the fact-bound nature of the probable cause determination and its inherent resistance to being captured by formulas and rules would virtually ensure that even a newly-enumerated probable cause assessment would have no operative effect, since the good faith standard would continue to protect all (or nearly all) sub-probable cause warrant searches.

22. The Franks Court observed that "[i]t is the ex parte nature of the initial hearing ... that is the reason for review." 438 U.S. at 169. So far as we are aware, not a single member of this Court since Weeks has voted to decide a case on the ground that a magistrate's erroneous determination of probable cause was beyond review, although it has been generally held that the magistrate's determination is entitled to deference

justification for affording judges and magistrates judicial immunity has been the amenability of their judicial errors to the corrective processes of appellate review, Bradley v. Fisher, 13 Wall. (80 U.S.) 335, 354 (1872); Stump v. Sparkman, 435 U.S. at 369 (Powell, J., dissenting), abolition of review by way of exclusion would be particularly ironic. In light of our constitutional system's commitment to subjecting abridgements of liberty to adversary judicial scrutiny except in the most extraordinary circumstances, particularly where judges may have exceeded constitutional limits, Rose v. Mitchell, 443 U.S. 545 (1979), it would be unthinkable to subject valuable Fourth Amendment freedoms to the unreviewable judgments of

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see supra at 19-20, and there has of course been a modicum of disagreement about particular determinations of probable cause. Under the United States' view, Nathanson v. United States, a unanimous decision and one of the bulwarks of the Fourth Amendment, was wrongly decided.

magistrates without possibility of judicial review, especially in light of the extremely minimal requirements for magistrates issuing warrants, Shadwick v. City of Tampa, 407 U.S. 345 (1972).

Equally importantly, by directing the attention of the police to whether a magistrate could be found to sign a warrant,[23] rather than to whether probable cause sufficient to warrant a magistrate's signature was present, the proposed good faith exception would reverse the present incentive "in close cases ... to err on the side of constitutional behavior." United States v. Johnson, 73 L.Ed.2d 202, 221 (1982); see also Owen v. City of Independence, 445 U.S. 622, 652-56 (1980). As in Johnson, the rule sought by the United States would "encourage police or other courts to disregard the plain purport of [the Court's]

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23. There is substantial evidence that magistrate-shopping is not uncommon. See LaFave, The Fourth Amendment in an Imperfect World: On Drawing Bright Lines and Good Faith, 43 U.Pitt.L.Rev. 307, 353 (1982).

decisions and to adopt a let's-wait-until-it's-decided approach". Id. (citation omitted). Moreover, as this Court has recently observed, a rule preventing challenge to unconstitutional conduct except in the most egregious cases "could also have the deleterious effect of freezing constitutional law in its current state of development .... " Owen v. City of Independence, 445 U.S. at 651 n.33.

Application of any sub-probable cause standard a good faith exception might incorporate -- e.g., admission of evidence seized under warrants deficient under Nathanson or Aguilar, or so long as reasonable belief under Terry was present -- would be indistinguishable in practice from the continued full application of the exclusionary rule together with a corresponding relaxation of probable cause. Such a dilution of probable cause standards would perhaps be justified

by some on grounds of social policy, although many, including amici, would strongly oppose it; but it would take either amendment of the Constitution or reversal of every one of this Court's probable cause decisions from Carroll and Brinegar through United States v. Ross to accomplish such a rewriting of a fundamental aspect of our law.

II. ILLEGALLY SEIZED EVIDENCE IS INADMISSIBLE AT TRIAL EVEN WHEN THE ILLEGAL SEIZURE WAS EFFECTED IN GOOD FAITH BECAUSE (A) THE FOURTH AMENDMENT FORBIDS IT; (B) THE USE OF SUCH EVIDENCE WOULD ENCOURAGE UNLAWFUL ACTIVITY; AND (C) RECOGNITION OF A DEFENSE BASED ON IGNORANCE OF THE LAW WOULD DISCOURAGE EFFECTIVE POLICE TRAINING.

Amici have demonstrated that in cases in which the substantive definition of probable cause is at issue, no difference exists between probable cause and the objective reasonableness requires to establish a good faith defense. If, however, this

Court believes that the objective reasonableness required to establish a good faith defense is less stringent than the objective reasonableness required to establish probable cause, it must confront the question of whether evidence obtained on less than probable cause may be used in contravention of the wishes of the founders.

A. The Use At Trial Of Evidence Obtained On Less Than Probable Cause Violates The Fourth Amendment.

It is a measure of what we may have lost as a free people that the question of whether unconstitutionally seized evidence may be utilized in a criminal case has been reduced in the minds of many to a strictly utilitarian equation: as long as the benefits of violating the Constitution outweigh the burdens,

the government asserts, the government may rely on "socially efficient" unconstitutional behavior to obtain a criminal conviction. Such an equation cannot, however, be the sole determinant of whether or not the government elects to benefit from its own lawless activity.[24] Both the Fourth Amendment and the imperative of judicial integrity forbids the courts -- and the government -- from becoming accessories to even a good faith

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24. Neither Weeks v. United States, supra, nor its early progeny rested on deterrence to the slightest degree. No mention of deterrence to support the rule appears in this Court's cases until Wolf v. Colorado, supra, and even in Wolf, the concept of deterrence ironically appeared in the Court's discussion of why the exclusionary rule was not being applied to the states:

> Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn ... a State's reliance upon other methods which, if consistently enforced, would be equally effective.

338 U.S. at 31 (emphasis added). Of course, the premise of Mapp, unchallenged to this day, is that such alternative remedies do not exist in any state in the union, as the United States apparently concedes. U.S. Supp. Br. 63-64.

violation of the Constitution. One can hardly expect widespread voluntary compliance with law when the government itself is licensed to break it.

It is not merely the illegal seizure of evidence which the Fourth Amendment condemns, but its use as part of an evidentiary transaction commencing with the police and continuing through the prosecutor to the court itself. E.g., Olmstead v. United States, 277 U.S. 438, 468 (1978) (adherence to Weeks for constitutional violations)(Taft, C.J.); Weeks v. United States, 232 U.S. at 391-92.[25] Since the

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25. Chief Justice Taft's majority opinion in Olmstead differed from Justices Holmes' and Brandeis' in refusing to apply the exclusionary rule to evidence seized merely illegally, but not unconstitutionally. The holding in Weeks, accepted by the entire Olmstead Court, was as follows:

> The effect of the Fourth Amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people ... against all unreasonable searches and seizures under the guise

court is integral to the transaction, it cannot insulate itself from responsibility for the unconstitutional nature of the evidence. As Chief Justice Traynor observed:

> When ... the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its hand and by allowing the evidence to be introduced. It is no answer to say that a distinction should be drawn between the government acting as law enforcer and the government acting as judge.

People v. Cahan, 44 Cal.2d 434, 445, 282 P.2d 905, 912 (1955).

Accordingly, so far as a discussion of illegally seized evidence against a defendant whose rights were violated by the seizure is concerned, the Constitution itself requires exclusion. Weeks

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> of law. This protection reaches all alike ... and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws.

232 U.S. at 391-92 (emphasis added).

v. United States, 232 U.S. at 391-92; Olmstead v. United States, 277 U.S. at 468; Mapp v. Ohio, 367 U.S. at 655, 657, 660.[26]

Although some have argued that the Court has departed from the views of the Weeks, Olmstead, and Mapp Courts, and have suggested that the judiciary may participate in a tainted evidentiary transaction which commenced with an illegal search of a defendant, the cases relied on (e.g., United States v. Calandia, 414 U.S. 338 (1973)) all involved the collateral use of illegally seized evidence, and none the use at trial for which the illegal seizure -- deliberate or not -- was undertaken. See, e.g., Stone v. Powell, 428 U.S. 465, 492-93 (1976). Amici urge that the concept of judicial integrity be reaffirmed

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26. Mapp could only have been a constitutional rule, since the Court lacks power to reverse state criminal convictions for violation of lesser norms.

as a bulwark of the Fourth Amendment, and that the Court adhere to the original understanding of Weeks. Judicial use is conceptually inseparable from evidentiary seizures because evidentiary seizures make no sense without an expectation of judicial use. The concept of evidence compels attention to the entire transaction. When any part of the government, including a court at a criminal trial, participates in an evidentiary transaction against an individual that includes a search or seizure violating his Fourth Amendment rights, it commits a constitutional wrong.

B. The Use of Illegally Seized Evidence, Even if Obtained in Good Faith, Would Encourage the Commission of Unlawful Acts.

As we have demonstrated, when use at case-in-chief is concerned, the question is not whether the costs of suppression outweigh the deterrent effect, but

simply whether "the admission of evidence encourages violations of Fourth Amendment rights." United States v. Janis, 428 U.S. 433, 458 n.35; see also Stone v. Powell, 428 U.S. at 492.[27] Even if one approaches the exclusionary rule as a strict cost/benefit exercise, however, the significance of the exclusionary rule would be seriously compromised when evidence seized illegally -- whether or not in "good faith" -- is admitted as part of the government's case-in-chief.

The cost of the exclusionary rule is, of course, nothing more than doing without evidence which the founders determined should never have been obtained in

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27. By holding that "courts must not commit or encourage violations of the Constitution," the Janis Court appears to have established a constitutional requirement to exclude evidence where failure to do so would encourage unconstitutional conduct. See Janis, 428 U.S. at 458 n.35; Mertens & Wasserstrom, supra n. 3 at 386 n.100. Professor Amsterdam has discerned a similar requirement, see Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 431-433, and it is implicit even in Justice Frankfurter's opinion for the Court in Wolf v. Colorado, 338 U.S. at 31.

the first place. Thus, for example, were we to dispense with the exclusionary rule and rely upon Draconian tort and criminal penalties to deter unlawful search activity, ideally the "cost" would be the same. Police officials, fearing retribution, would refrain from conducting an illegal search, thereby depriving the system of the same evidence currently excluded by the exclusionary rule. See supra at 9-13 and infra Appendix A. As a practical matter, of course, we know that no such retributive system existed either pre-Mapp or post-Mapp, and none is likely to.[28] Thus, the cost analysis submitted by the United States is merely shorthand for the proposition that an effective mechanism should be replaced with an ineffective one

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28. "Self-scrutiny is a lofty-ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clauses ... " Franks v. Delaware, 438 U.S. at 169 (quoting from Mapp v. Ohio and Wolf v. Colorado).

because we are not prepared to bear the "cost" of the value judgments embedded in the Fourth Amendment. If, however, heretofore settled Fourth Amendment standards are to be modified, it should be by direct amendment or open judicial reexamination and not by the covert device of rendering them unenforceable.

The benefits of the exclusionary rule are obvious. First, it acts as a powerful incentive to the adoption of police procedures designed to comply with Fourth Amendment guidelines. Second, it reinforces our commitment to the founders' idea by unequivocally reaffirming our respect for the Fourth Amendment. Finally, like legal norms generally, which are enforceable whether or not the actor knows what the law is, it deters both willful and careless activity in viola-

tion of the Fourth Amendment.[29]

The impact of a good faith defense on the benefits of the exclusionary rule is equally obvious.

First, contrary to the submission of the United States, which argues strenuously that an honest mistake such as was made by the Delaware State police "should not be met with the severe sanction of suppression,"[30] it is precisely in close cases where a good faith exception would presumably apply that this Court's enunciation of new law predictably leads to the most substantial reduction, through

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29. The proposition that the exclusionary rule cannot deter well-meaning violations is contrary to settled principles of criminal law. See, e.g., Holmes, The Common Law, 48 (1881); Lambert v. California, 355 U.S. 225, 228 (1957).

30. U.S. Supp. Br. 36. Throughout, the United States refers confusingly to the exclusionary rule as a sanction against or punishment of the individual officer. See, e.g., U.S. Supp. Br. at 30, 36. As the United States knows, however, the deterrent effect of the rule has rarely, if ever, been supported as a punishment of offending officers. Its deterrent effect is obviously found in general or systemic deterrence. See generally Mertens & Wasserstrom, supra n.3, at 394-401.

systemic deterrence, of unlawful activity. A recent detailed study of police reactions to Delaware v. Prouse, 440 U.S. 648 (1979) demonstrates how police departments in Washington, D.C. and Delaware responded immediately by issuing detailed new instructions to officers in the field, setting forth the rules established in Prouse and advising them to desist from present (unconstitutional) practices. Mertens & Wasserstrom, supra n.3, at 399-401. The Legal Liaison Office of the Delaware State Police (and presumably similar offices in similar states as well) disseiminates "[a]ll court decisions affecting daily police operations ... to patrol officers by similar Legal Memorandums." Police in other jurisdictions respond similarly to this Court's decisions where

good faith would have been shown.[31]

Assuming, as seems extremely reasonable, that such departmental directions lead to substantial compliance from officers in the field, police throughout the country have now abandoned an unconstitutional practice at the suppression of a single marijuana prosecution. Countless

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31. Mertens & Wasserstrom, supra n. 3, at 400 n.174 (reaction to Almeida-Sanchez v. United States, 413 U.S. 266 (1973)); id. at 401 n.175 (address by FBI Director Webster detailing FBI's present methods for apprising field agents of relevant Supreme Court and Court of Appeals Fourth Amendment violations.) At a post-Mapp training session, the New York Deputy Police Commissioner commented:

> The Mapp case was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants. Although the United States Constitution requires warrants in most cases, the U.S. Supreme Court had ruled [until 1961] that evidence obtained without a warrant -- illegally, if you will -- was admissible in state courts. So the feeling was, why bother?

N.Y. Times, April 28, 1965, p.50. See also supra at n.19 (post-Mapp experience of New York and Los Angeles). See also Canon, Is the Exclusionary Rule in Failing Health?, 62 Ky.L.J. 651, 710-14 (1974)(post-Mapp increase in number of search warrants issued).

motorists have been spared violations of their constitutional rights. The rule, even where good faith is present, prevents abridgement of Fourth Amendment rights through law enforcement's institutional response to changes in Fourth Amendment law.

Moreover, a good faith exception would inhibit the very evolution of vital constitutional guidelines, since courts would inevitably focus on the fact-based issue of good faith before deciding a Fourth Amendment issue. Had a good faith exception to the exclusionary rule existed of the type proposed by the United States, the Delaware courts would undoubtedly have used it to reject Prouse's motion to suppress the marijuana which police had seized and for whose possession he had been charged, without even the occasion to decide the constitutional question; and even if the court had gone on to

"decide" the constitutional question despite denial of the suppression motion, its ruling would have been merely dicta, unreviewable in this Court. See United States v. Bowen and other cases cited supra at 29. Moreover, this Court's cases make clear that no other case could have arisen in which to formulate the rule of law the suppression motion in Prouse occasioned.[32]

In short, since it is readily apparent that many of the vital protections afforded by the Fourth Amendment could never have been enunciated without exclusionary rule applying where the good faith exception advanced by the United States would have been applicable, e.g., Chimel v. California, 395 U.S. 752 (1969), overruling United

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32. Injunctive or declaratory relief would appear foreclosed by such cases as Rizzo v. Goode, 423 U.S. 362 (1976) and O'Shea v. Littleton, 414 U.S. 488 (1974), but see City of Los Angeles v. Lyons, No. 81-1064 (decision pending). Damages would appear barred by the good faith defense, see, e.g., Pierson v. Ray, 386 U.S. 547 (1967). See also supra at 27-28.

States v. Rabinowitz, 339 U.S. 556 (1950) (limits of search incident to arrest); United States v. Katz, 389 U.S. 347 (1967), overruling Olmstead v. United States, 277 U.S. 438 (1928)(electronic eavesdropping); Payton v.New York, 445 U.S. 573 (1980) (warrantless entry into house for arrest); Steageld v. United States, 451 U.S. 204 (1981)(entry into third-party house upon arrest warrant), the exception must be rejected on grounds of deterrence.[33]

33. See generally Mertens & Wasserstrom, supra n. 3 , at 401-06. The cases cited supra, plainly refute the suggestion of the United States that the "lost decisionmaking opportunities will be confined to "grey, twilight area[s]" of Fourth Amendment law. More generally, the underlying premise -- that a good faith exception was unwise for nearly seventy years so that the courts could decide Fourth Amendment cases, but that we now have "enough law" and should now adopt the exception -- represents a Panglossian view of the law and legal development which has no support in our jurisprudence.

C. Maintenance of the Present Scope Of the Fourth Amendment Would Be Impermissible Under a Good Faith Exception. The Fourth Amendment Would Shrink to Reasonableness in Every Case, Without the Specific and Reasonably Bright-Line Rules the Court has Relied on to Cabin Police Investigation Within Constitutional Limits.

Although the Court has correctly recognized that the fundamental test of every search or seizure is its reasonableness, it has resisted relying solely on an unguided inquiry into the reasonableness of police conduct under the circumstances of individual cases. See United States v. Rabinowitz, 339 U.S. 56, 83-84 (1950)(Frankfurter, J., dissenting); Chimel v. California, 395 U.S. 752, 768 (1969), overruling United States v. Rabinowitz.[34] Under the discredited Rabinowitz approach, which left reason-

34. Justice Frankfurter's criticism in Rabinowitz of the "facts and circumstances" approach to Fourth Amendment reasonableness has been termed the "lore of the Fourth Amendment". Amsterdam, supra n.27, at 394. See United States v. United States District Court, 407 U.S. 297, 315-16 (1972).

ableness to the unguided discretion of the trial court, "appellate courts defer to trial courts and trial courts defer to police."[35] In the absence of clear rules for police to follow, what they do will rarely be found "unreasonable", and the "right of the people would be 'secure in their persons, houses, papers, and effects' only in the discretion of the police." Beck v. Ohio, 379 U.S. 89, 97 (1964). Accordingly, the Court has rested the protection of the Fourth Amendment largely on a process of categorization, relying on reasonably bright lines to enable greater police compliance with the Fourth Amendment.[36]

The good faith exception suggested by the United States is wholly inconsistent with that objective, categorical approach, and would soon turn Fourth Amendment juris-

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35. Amsterdam, supra n.27, at 394.

36. See, e.g., New York v. Belton, 453 U.S. 454 (1981); United States v. Ross, supra.

prudence into the "immense Rorschach blot"[37] that the Court has strenuously avoided. The inexorable tendency of a good faith exception to reduce present probable cause standards has already been analyzed in Point IC, supra. Equally damaged, however, would be the Court's categorical approach to the warrant requirement, which has been seen as "the very heart of the Fourth Amendment directive", United States v. United States District Court, 407 U.S. at 316. As Justice Jackson, himself a former prosecutor, long ago observed, "The extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit", Brinegar v. United States, 338 U.S. at 183 (dis-

37. Amsterdam, supra n.27 at 394.

senting opinion).[38]

Cases like Torres v. Puerto Rico, 442 U.S. 465 (1979), for example, would not be substantively decided under the approach of the United States. The lower courts would find the action of the searching officers who acted under legislative direction in objective good faith. Similarly, the rule established by Ybarra v. Illinois, 444 U.S. 85 (1980), could not have been settled, since, as in Torres, the officers certainly acted reasonably -- even if illegally -- in searching, under an Illinois

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38. Significantly, the number of warrants issued by federal magistrates declined from 7338 in 1972 to 4756 in 1980, the very period during which the exclusionary rule began to be held not to apply beyond direct criminal trials. 1980 Annual Report of the Director of the Administrative Office of the U.S. Courts, at 140. This, during a period when the federal rules were changed to permit telephonic warrants. There is every reason to believe that this 40% drop reflects a drop in warrant applications presented to magistrates, not in grant of applications presented. By contrast, warrant applications rose sharply after Mapp, see Kamisar, On the Tactics of Police - Prosecutor Oriented Critics of the Court, 49 Cornell L.Q. 436 (1964); Canon, Is the Exclusionary Rule in Failing Health?, 62 Ky.L.J. 651, 710-14 (1974).

statute, portions of the bar for which they had a warrant.

In short, the legal question settled by the courts would no longer be whether a warrant was necessary under the circumstances, a ruling which could then disseminated by law enforcement agencies with substantial practical impact, but whether police were reasonable in thinking that it was not. The scope for warrantless searches would be accordingly expanded. Reasonable arguments, of course, have been advanced against this Court's understanding and application of the warrant clause;[39] but if the present substantive and procedural requirements of the Fourth Amendment are to be relaxed, better that it be done directly, rather than indirectly as a consequence of the degree to which purportedly unchanged Fourth Amendment standards are rendered

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39. See generally, T. Taylor, Two Studies in Constitutional Interpretation (1969).

sterile through barriers to their enforcement.

D. The Remaining Arguments Supporting A Good Faith Exception Are Insufficient to Warrant, and Additional Considerations Militate Against, Its Acceptance.

Emphasizing the importance of maintaining settled law, of clarity, and of "respect for continuity", so far as the Fourth Amendment is concerned, particularly when so many officers in so many localities necessarily make daily decisions under the shadow of this Court's Fourth Amendment jurisprudence, Justice Frankfurter warned against

> reinforc[ing] needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance -- for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors.

United States v. Rabinowitz, 339 U.S. at 86.

The approach the United States urges here would not only dramatically

reverse "the course of true law" since the Court's unanimous decision in Weeks, but would severely increase the likelihood of different results in similar cases. Judgments as to the objective good faith of officers in identical cases might well depend on the training of officers in a jurisdiction, or whether a rule of law had been locally settled. Moreover, the unifying forces of appellate review which work when the question is "what is the law?" have far less force when the question is "would a reasonable police officer (in Chicago? in rural Wyoming?) have believed his action was lawful?"

Against this background, the argument of the United States attacking Weeks and supporting creation of a good faith exception lack merit.

1. Cost

We have previously pointed out that the principal "cost" of the exclusionary

rule as currently enforced to which the United States and other critics object is a cost imposed by the Fourth Amendment's substantive requirements, see supra at 41-43, and therefore not one which opponents of the exclusionary rule can properly rely on. Moreover, of course, those "costs" are not especially attributable to cases to which a good faith exception would apply and therefore, if compelling, bear on the entire exclusionary question, not to the narrower question before the Court.

Nevertheless, we briefly address the question of costs, first, to show that the evidence relied on by the United States is entirely speculative, erroneous, interested and irrelevant, and second, to show that even on its own terms that evidence fails to support the enormity of the change sought by the United States.

The leading study on costs, the GAO report, fully confirms Professor LaFave's

judgment that "the 'cost' of the exclusionary rule, in terms of acquittals or dismissed cases, is much lower than is commonly assumed."[40] Although the United States suggests that GAO figures for federal prosecutorial declinations for Fourth Amendment reasons are unrepresentative, a recent independent study (funded by LEAA) showed that in five localities, declinations for all due process reasons -- not just search and seizure -- ranged from 1% of rejected cases in the District of Columbia, 2% in Salt Lake City, 4% in Los Angeles and 9% in New Orleans.[41]

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40. W. LaFave, Search and Seizure § 1.2 n.9 (1981 Supp.).

41. Brosi, A Cross-City Comparison of Felony Case Processing (INSLAW 1979) at 19. Of more than 15,000 declinations for due process reasons, only one homicide was involved and no rapes. 83% of the declinations in New Orleans involved drug cases. Id.

The other conclusion drawn by the United States from the GAO report -- that "a definite relationship exists between suppression of evidence" and conviction (U.S. Br. 47) since conviction rates are lower for defendants whose sup-

The conclusions of the NIJ study relied on by the United States are both exceptionally misleading and seriously flawed.[42] Quoting from the report's summary, the United States claims that "4.8%, or the more than 4000 felony cases declined for prosecution [statewide] were rejected because of search and seizure problems," U.S. Supp. Br. 48, with somewhat higher figures in particular communities. Id. at n.29. Yet the relevant measure of the rule's cost is not what percent of rejected cases (86,033)

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pression motions are granted -- is similarly unjustified. The GAO could not explain and declined to speculate on the reason for that statistic; and it is reasonable to assume that counsel who managed (against heavy odds) to prevail on suppression motions are more energetic, competent, and successful than those who do not.

42. We note, although the Solicitor General did not, that NIJ is a part of the Department of Justice. The NIJ study was commissioned by political appointees to support the administration's policy directives. When a request for proposals to consultants was entirely unsuccessful, NIJ undertook the study itself in extraordinary haste: it was commenced on October 1, 1982, and completed by December.

were rejected for Fourth Amendment reasons, but what percent of felony complaints (520,993) were so rejected; and on that basis, the NIJ statistics show that less than 0.8% of arrests made by police were reported by the police and prosecutors as declined for Fourth Amendent reasons.[43]

Similarly misleading is the reliance on NIJ figures concerning the re-arrest rate of those "released because their cases had been rejected for prosecution."[44] See U.S. Br. at 49. Neither the United States nor its "study" included any comparative data on re-arrest rates for those with past involvement in the criminal justice system

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43. All of the data are self-reports by prosecutors; none were verified in any way. Also misleading is reliance on an NIJ figure of "30% of all felony drug arrests [rejected] because of search and seizure problems." U.S. Br. at 49. The number on which that percentage is based -- 114 cases -- is far too small to be of the slightest statistcal value.

44. Preliminarily, it should be noted that a defendant not tried on the original charge was apparently classified as released even if convicted on other (usually lesser, to be sure) charges.

generally; and assuming, as many studies have, that those who have been incarcerated commit more crime after release than those who have not, it would be as reasonable to support the exclusionary rule for preventing (even non-official) crime. Certainly there is no basis for linking the extraordinarily slight incidence of the exclusionary rule to free defendants to the likelihood of vel non of a defendant's future criminal conduct.[45]

Even to the minimal extent that the government's own study points to a dis-

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45. The GAO study reported that evidence was excluded in only 1.3% of 2804 cases (36) accepted for prosecution; a suppression motion was made in only 16% of those 2804 cases, and granted in total in only 3% of the 16%.

Although we are unaware of firm evidence on the subject, reported cases made clear that suppression does not necessarily lead to a failure of prosecution. For example, the defendants in six recent cases in this Court -- Mincey v. Arizona, 437 U.S. 385 (1977); Brewer v. Williams, 430 U.S. 387 (1976)(Sixth Amendment); Franks v. Delaware, 438 U.S. 154 (1977); Davis v. Mississippi, 394 U.S. 721 (1969); Bumper v. North Carolina, 391 U.S. 543 (1968); and Coolidge v. New Hampshire, 403 U.S. 443 (1971) were all convicted on remand. See, e.g., Mertens & Wasserstrom, supra n.3, at 445.

cernible "cost", that cost is concentrated nearly wholly in drug cases; only 0.4% of the California cases declined for prosecution for search and seizure reasons involved rape and murder, and even including assault the figure rises only to 3.6%.[46] Cutting a good faith hole in the exclusionary rule for all cases so large as to render decisions like Delaware v. Prouse and Payton v. New York, supra, impossible, when the principal cost to which the United States points is concentrated in only a small fraction of cases, and not those which have led to public concern over street crime, is hardly the proportionality the United States professes to

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46. See also INSLAW, supra n. 41, at 19; NIJ at 12-13 (more than 70% drug-related). Significantly, all the figures relied on by the United States from the NIJ study are for arrests, not convictions, and therefore are likely to substantially overstate any "cost" involved.

Available data on suppression motions indicate that they are denied in great proportion. See U.S. Br. at 53. See also Davies, Do Criminals Due Process Principles Make a Difference?, 1982 Am. Bar Assn. Res. J. 247, 265.

seek.[47]

In any event, since even the United States concedes that modification of the rule will not affect the crime problem to a "material extent", see U.S. Supp. Br. 50, continued reliance on the "costs" of the rule is sheer demagoguery.

2. Premium on Ignorance

Despite the United States' vigorous protestations to the contrary (U.S. Supp. Br. 57), a good faith exception would plainly put a premium on 'police ignorance'. Any departure from standards taught in the training of police in a given locality would be extremely probative, from a

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47. So far as proportionality is concerned, it can hardly have any place in cases like this, that involve not a claim of a "technicial" violation, but rather the substantive standard of the Fourth Amendment. If probable cause is not present, there is no justification for a search. After Rummel v. Estelle, 445 U.S. 263 (1980), Hutto v. Davis, 70 L.Ed.2d 556 (1982), it is difficult to believe that district courts are to be set out to determine proportionality on a case-by-case basis.

defendant's point of view, of the lack of objective good faith. Tc the extent that departmental training materials condemned certain procedures -- say, procedures not currently judicially condemned in the local jurisdiction but struck down in other states or appellate courts -- any officer engaging in these procedures could be found not acting as a reasonably trained, cautious and prudent officer.[48] The current incentive to properly train and educate officers would be reversed.

CONCLUSION

Just last term, the Court counted it of the "greatest importance ... that the rule we apply in this case is faithful to the interpretation of the Fourth Amendment that the Court has followed with substantial consistency throughout our history."

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48. Professor Kaplan rejects a good faith exception precisely because it would foster police ignorance, see Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L.Rev. 1027, 1044 (1974), and the United States' reliance on his article in this regard (U.S. Supp. Br. 58) is inexplicable.

United States v. Ross, 72 L.Ed.2d at 593. The history of the exclusionary rule in this Court admits of no good faith exception. For that reason, and for all the other reasons set forth in this brief, such an exception should be firmly rejected by this Court.

Respectfully submitted,

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February 11, 1983

APPENDIX

APPENDIX

In response to Wigmore's famous criticism of the exclusionary rule, the American Bar Association published this reply by Connor Hall, a member of the Cabel County Bar in Huntington, West Virginia:

> When it is proposed to secure the citizen his constitutional rights by the direct punishment of the violating officer, we must assume that the proposer is honest, and that he would have such consistent prosecution and such heavy punishment of the offending officer as would cause violations to cease and thus put a stop to the seizure of papers and other tangible evidence through unlawful search.
>
> If this, then, is to be the result, no evidence in any appreciable number of cases would be obtained through unlawful searches, and the result would be the same, so far as the conviction of criminals goes, as if the constitutional right was enforced by a return of the evidence.
>
> Then why such anger in celestial breasts? Justice can be rendered inefficient and the criminal classes coddled by the rule laid down in Weeks only upon the assumption

> that the officer will not be directly punished, but that the court will receive the fruits of his lawful acts, will do no more than denounce and threaten him with jail or the penitentiary and, at the same time, with its tongue in its cheek, give him to understand how fearful a thing it is to violate the Constitution. This has been the result previous to the rule adopted by the Supreme Court, and that is what the courts are asked to continue.
>
> ... If punishment of the officer is effective to prevent unlawful searches, then equally by this is injustice rendered inefficient and criminals coddled. It is only by violations that the great god Efficiency can thrive.

C. Hall, Evidence and the Fourth Amendment, 8 A.B.A.J. 646 (1922), reprinted in Kamisar, The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than an Empty Blessing, 62 Jud. 337, 344 (1979).

Amicus Brief

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No. 81-430

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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SUPREME COURT, U.S.

THE STATE OF ILLINOIS,
Petitioner,

v.

LANCE GATES AND SUSAN GATES,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

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No. 81-430

In The
Supreme Court of the United States
October Term, 1982

THE STATE OF ILLINOIS,
Petitioner,

against

LANCE GATES and SUSAN GATES
Respondents

On Writ of Certiorari to The Supreme Court of Illinois

BRIEF OF AMICUS CURIAE ON BEHALF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The Association of Trial Lawyers of America, founded 37 years ago, is a voluntary National Bar Association with a membership exceeding 50,000 advocates of whom 5,000, constituting the Criminal Law Section, regularly appear in both state

and federal courts in defense of those accused of crime. The men and women of the Association, believed to be the largest trial bar in the world, are pledged to the preservation of the American legal system, the protection of individual rights and liberties, and the evolution of the common law. The Association, through its appropriate officers and committees, has authorized its participation in this case as amicus curiae. This brief is filed with the written consent of all the parties.

The Association is vitally concerned with this appeal, not only for the instant case, but also for the effect the decision in this case will have on similar cases now pending throughout the country as well as on the development of constitutional doctrine. Believing that the efficacy of the Fourth Amendment pro-

tections depends on the unencumbered viability of the exclusionary rule, the Association appreciates that this case is of critical importance to its members and their clients.

SUMMARY OF ARGUMENT

Opponents of the exclusionary rule have chosen to identify its principal if not sole purpose as the deterrence of unconstitutional behavior by law enforcement officers. Having thus characterized the rule, they then place the onus upon its defenders to demonstrate empirically that deterrence does result. While deterrence of unconstitutional acts is frequently demonstrable, though often difficult to quantify, the debate on this issue is largely a distraction from the

fundamental justificaton: the Fourth Amendment provides for the liberty, property and privacy of individuals, and the exclusionary rule vindicates any deprivation of those rights.

Never has it been suggested that a utilitarian analysis be employed in regard to the enforcement of other constitutional rights—for example, the exclusion of illegally obtained confessions, the right to confront one's accuser, or the effective assistance of counsel. In these and many other areas, once a constitutional deprivation was found, no reflection upon the deterrent effect of voiding the conviction has been considered appropriate. The fact that the petitioner had been denied a constitutional right was good and sufficient reason for granting relief.

To speak in terms of balancing the rights of the individual against society's needs for law enforcement is misplaced in an analysis of the exclusionary rule. The balancing process is applicable and in fact necessary in defining the scope of the Fourth Amendment. When the balancing analysis is applied to the exclusionary rule an ominous result occurs: unconstitutional actions on the part of law enforcement officers are condoned. This Court has never held that practical needs could justify governmental acts that are unconstitutional.

While it is accurate to say that the exclusionary rule is not explicit in the Fourth Amendment, this in no way distinguishes the Fourth Amendment from other provisions in the Bill of Rights. Read literally, nothing in the panoply of constitutional guarantees for those accused

of crime specifies the remedy for a deprivation. The implication, however, has always been clear: a criminal conviction cannot stand if achieved at the cost of violating the constitution. Illegally obtained confessions may not be admitted into evidence, Spano v. New York, 360 U.S. 315 (1959), and a conviction obtained in violation of the right to counsel cannot stand, Gideon v. Wainwright, 372 U.S. 335 (1963); even though no provision in the Bill of Rights makes these results mandatory.

The adoption of a good faith exception to the exclusionary rule would seriously curtail the development of Fourth Amendment law. The landmark cases defining the scope of the Fourth Amendment have reached this Court only because convictions were obtained on evidence allegedly seized unconstitutionally. In

some of the cases the government prevailed while in others the accused was vindicated. But if a good faith exception to the exclusionary rule had been applicable the constitutional question might have been avoided altogether. Furthermore, the likelihood of the applicability of a good faith exception may in many cases remove the incentive to appeal, thus denying this Court the opportunity to clarify permissible law enforcement behavior. Such would likely have been the result in Terry v. Ohio, 392 U.S. 1 (1968), in which the Court articulated constitutional guidelines for field investigation procedures where none had previously existed. Every jurisdiction has relied on the announced Terry standards and, overwhelmingly, the government has prevailed. See Cook, Consti-

tutional Rights of the Accused: Pretrial Rights §7, at 55 n.10 (1972 and Supp.).

Adoption of a good faith exception to the exclusionary rule would also significantly reduce the incentive for law enforcement institutions to govern their conduct by Fourth Amendment standards. In Delaware v. Prouse, 440 U.S. 648 (1979) this Court reversed the drug related conviction, holding that random stopping of cars for driver's license checks was unconstitutional. However, the Court took the opportunity to note that stops which eliminated the potential for the "unbridled discretion" of the officers would be constitutional. Had the conviction been allowed to stand because of the good faith of the arresting officer, the decision might well be interpreted to mean that random vehicle stops, though unconstitutional, were per-

missible so long as the officer acted in good faith. While disingenuousness on the part of law enforcement officials may not be tolerated, ignorance of the law may lead to the same result.

Ostensibly, the case now before this Court presents the most appealing situation in which to apply the good faith exception to the exclusionary rule. The officer sought and obtained a warrant before carrying out the search and therefore had every reason to believe the search was constitutional. Indeed, it could be argued that every search made pursuant to a warrant, except for the rare case of fraud or collusion, is made in good faith. Thus evidence so obtained would be admissible, not because supported by probable cause but rather because made in good faith. Such a result could hardly be more antithetical to the

Fourth Amendment. A warrant issued without the requisite probable cause is constitutionally void as this Court has held. Good faith is not interchangeable with probable cause. Terry v. Ohio, 392 U.S. 1 (1968); Beck v. Ohio, 379 U.S. 89 (1964). To admit evidence seized under a warrant unsupported by probable cause would substitute good faith for the explicit requirements of the Fourth Amendment and render judicial review of warrant affidavits superfluous absent an allegation of bad faith on the part of the officer or the issuing magistrate.

ARGUMENT

I. THE EXCLUSIONARY RULE IS AN INDISPENSABLE COROLLARY TO THE FOURTH AMENDMENT.

A. The Fourth Amendment creates a personal constitutional right, and the exclusionary rule says no more than that the government should not gain from the denial of that right.

The Justices who held in Weeks v. United States, 232 U.S. 383 (1914) that evidence obtained in violation of the Fourth Amendment was inadmissible in federal prosecutions would "be quite surprised to learn that some day the value of the exclusionary rule would be measured by—and the very life of the rule might depend on—an empirical evaluation of its efficacy in deterring police conduct." Kamisar, A Defense of the Exclusionary Rule, 15 Crim. L. Bull. 5 (1979). Rather, the exclusionary rule as originally articulated by this Court, rested on "a principled basis rather than an empirical proposition." Allen, The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases, 1975 U. Ill. L. F. 518, 536-37.

In Weeks, this Court said:

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under the limitations and restraints as to the exercise of such power and authority, . . . The tendency of those who execute the criminal laws . . . to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.
>
> . . .
>
> The efforts of the courts and their officials to bring the guilty to punishment . . . are not to be aided by the sacrifice of [Fourth Amendment] principles. . . .To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

Weeks v. United States, 232 U.S. 383, 391-92, 393-94 (1914). See also Schrock & Welsh, Up from Calandra: The Exclusionary Rule as a Constitutional Requirement,

59 Minn. L. Rev. 251, 257-60 (1974); Mertens & Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L.J. 365, 377-78 (1981). While the exclusionary rule deters unconstitutional police behavior (see IIC, infra), deterrence is an ancillary benefit of the rule. Opponents of the exclusionary rule have chosen to identify its principle, if not sole purpose as the deterrence of unconstitutional behavior by law enforcement officers. The debate regarding deterrence diverts attention from the fundamental justification for the exclusionary rule: the Fourth Amendment provides protection for the liberty, property and privacy of individuals, and the exclusionary rule vindicates any deprivation of these rights.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Like the other provisions of the Bill of Rights, it recognizes a personal right and prohibits the violation of that right by the government. Id. The personal nature of the right protected by the Fourth Amendment has been acknowledged repeatedly by this Court in cases addressing the Fourth Amendment standing doctrine. Alderman v. United States, 394 U.S. 165, 171-72, 174 (1969) ("We adhere . . . to the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." Id. at 174); Simmons v. United States, 390 U.S. 377, 389 (1968) ("[R]ights assured by the Fourth Amend-

ment are personal rights, and . . . they may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." Id. at 389).

More recently in Rakas v. Illinois, 439 U.S. 128 (1978), this Court, while ostensibly eliminating standing as a distinct inquiry in Fourth Amendment cases, emphasized the personal nature of the protected interest. In Rakas, the defendants sought suppression of evidence obtained in a search of the automobile in which they were passengers. The Court "reaffirmed the principle that the 'rights assured by the Fourth Amendment are personal rights [which] . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and sei-

zure,'" Simmons v. United States, 390 U.S., at 389 . . ." Id. at 138.

Notwithstanding the consistently reaffirmed recognition that the Fourth Amendment protects a personal constitutional right, more recently this Court has expressed the view that the exclusionary rule is not itself an aspect of that right. Stone v. Powell, 428 U.S. 465 (1976). Rather, this Court has taken the view that "[t]he primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights." Id. at 486. The constitutional history of the Fourth Amendment, however, counsels that this assumption be reassessed.

The requirement of a personal interests, whether recognized as a standing requirement or as part of the constitutional protection itself is strong indi-

cation that the primary purpose for the exclusion of illegally seized evidence is not to deter police misconduct, for were this the case the focus of attention would be primarily upon the actions of the law enforcement officers, not upon the party raising the objection. If the purpose of the exclusionary rule was to effectuate deterrence, this Court should have abolished the personal interest requirement in cases such as Alderman v. United States, 394 U.S. 165 (1969), and Rakas v. Illinois, 439 U.S. 128 (1978), In Alderman, elimination of the standing requirement clearly would have fostered deterrence, but this Court explicitly rejected that course:

> The deterrent value of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence

> even though the case against the defendant is weakened or destroyed . . . But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

Alderman v. United States, 394 U.S. 165, 174-75 (1969).

Indeed, if deterring unconstitutional police activity were the dispositive factor in applying the exclusionary rule, United States v. Payner, 447 U.S. 727 (1980), presented a most compelling case for the exclusion of evidence. In Payner, the trial court found that, as a matter of stategy in tax investigations, "the Government affirmatively counsels its agents that the Fourth Amendment standing limitations permits them to purposefully conduct an unconstitutional

search and seizure of one individual in order to obtain evidence against third parties, who are the sole targets of the governmental instrusion, and that the IRS agents in this case acted, and will act in the future, according to that counsel." United States v. Payner, 434 F. Supp. 113, 132-33 (N.D. Ohio 1977). The deterrent effect of excluding evidence so obtained is apparent, but this Court refused to apply the exclusionary rule holding, "[o]ur Fourth Amendment decisions have established beyond any doubt that the interests in deterring illegal search does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices." United States v. Payner, 447 U.S. 727, 735 (1980).

The assumption that deterrence is the "primary justification" for the exclu-

sionary rule is therefore difficult to reconcile with, first, this Court's emphasis on the personal nature of the Fourth Amendment protection and, second, its frequent refusal to exclude evidence where the deterrent effect of doing so was clear. Moreover, there is a lack of constitutional justification for treating deterrence as the "primary justification" for the exclusionary rule. Although the rigorous protection of constitutional rights inevitably entails the repudiation of official conduct which violates those rights, surely the pre-eminent reason for afording judicial relief is the mere fact that a right has been violated. Fourth Amendment claims offer nothing unique in this regard. An accused denied the Sixth Amendment right to counsel in a criminal prosecution will have his conviction reversed solely because he has been denied

a fundamental right. Gideon v. Wainwright, 372 U.S. 335 (1963). A salutary result of this decision may be to deter future courts from trying an accused without the assistance of counsel, but to justify the decision one need go no further than to observe that the party involved was denied a federal constitutional right. When a confession is suppressed because obtained by unconstitutional means, the effect of the decision will be to alter law enforcement practices to comply with articulated constitutional standards, but the primary justification for the holding is the vindication of rights protected by the Fifth, Sixth and/or Fourteenth Amendments. When this Court sustained the right of a draft protester to carry a potentially offensive placard through the corridors of a court house in Cohen v. California, 403

U.S. 15 (1971), the decision may have encouraged greater governmental tolerance for unpopular and confrontational views, but the vindication of the First Amendment right of the petitioner was important enough, standing alone to support the decision. Cohen v. California, 403 U.S. 15, 24-25 (1971).

Proponents of modifying the exclusionary rule make the argument that individual rights must be balanced against societal needs for law enforcement. In its place, this is not only a plausible argument, but a central theme in this Court's interpretation of the Fourth Amendment. It is central to Chief Justice Warren's opinion for this Court in Terry v. Ohio, 392 U.S. 1 (1968), legitimizing brief detention and frisks notwithstanding the absence of probable cause. The need to enforce prohibition

laws generated an exception to the warrant requirement. See Carroll v. United States, 267 U.S. 132 (1925). The felt necessities of the times have sustained the practice of searching all persons boarding commercial air flights even though such practices would clearly have violated the Fourth Amendment in an earlier era. See e.g., United States v. Clay, 638 F.2d 889 (5th Cir.), cert. denied, 451 U.S. 917 (1981); United States v. Moreno, 475 F.2d 44 (5th Cir.), cert. denied, 414 U.S. 840 (1973); United States v. Bell, 464 F.2d 667 (2d Cir.), cert. denied, 409 U.S. 991 (1972); United States v. Epperson, 454 F.2d 769 (4th Cir.), cert. denied, 406 U.S. 947 (1972) Shapiro v. State, 390 So.2d 344 (Fla. 1980), cert. denied, 450 U.S. 982 (1981); See generally Comment, Applying Constitutional Standards to Airport Security

Searches, 5 Loy. U. Chi. L. J. 186 (1974); Comment, Searching for Hijackers: Constitutionality, Costs, and Alternatives, 40 U. Chi. L. Rev. 383 (1973).

In all these cases, however, the balancing process was employed in defining the scope of the protection of the Fourth Amendment. When used to support a modification of the exclusionary rule, however, something quite different is at issue. The argument is not that the Fourth Amendment protection should be tempered but that unconstitutional actions on the part of law enforcement officers should be condoned. Never before has this Court held that practical needs could excuse governmental acts which were concededly unconstitutional. See Cann & Egbert, The Exclusionary Rule: Its Necessity in Constitutional Democracy, 23 How. L.J. 299, 319-20 (1980).

While it is implicit in virtually every action of this Court that behavior of parties other than those before the Court will be modified in an effort to comply with the Court's interpretation of the constitution, the primary concern of the Court is, and must be, whether constitutional standards have been satisfied in the case before it. If the government is found to have violated an individual's constitutional right, the government should not benefit from its wrong. To say that evidence seized in violation of the Fourth Amendment may not be used to convict an accused is most notable for its obviousness.

B. That the Fourth Amendment does not by its terms preclude criminal convictions based on illegally seized evidence does not distinguish it from other constitutional protections, the deprivation of which have required the reversal of convictions.

Efforts to belittle the constitutional significance of the exclusionary rule have been encouraged by this Court's observation that it is but a "matter of judicial implication," Wolf v. Colorado, 338 U.S. 25, 28 (1949). More recently, in Stone v. Powell, 428 U.S. 465 (1976) this Court expressed the belief "that the [exclusionary] rule is not a personal constitutional right," but rather "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . " Id. at 486. (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)). That these declarations are accurate is undeniable, but their significance is something less than might initially appear. While the Fourth Amendment contains no exclusionary rule, neither does any other provision of the Bill of Rights. Nowhere

in the constitution does it say that illegally obtained confessions may not be admitted in evidence. Indeed, confessions are not mentioned in the constitution at all. Yet in Spano v. New York, 360 U.S. 315 (1959), this Court did not hesitate to order such evidence excluded, specifically noting that:

> abhorrence . . . to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deeprooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods to convict those thought to be criminals as from the actual criminals themselves.

Id. at 320-21. See Kamisar, supra at 18-20. Nowhere in the Sixth Amendment does it say that when the accused has been denied the right of confrontation regarding a particular statement, such is to be excluded. But a conviction was reversed in Pointer v. Texas, 380 U.S.

400 (1965) upon a finding that "the Sixth Amendment's right of an accused to confront the witness against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment." Id. at 403. Nowhere in the Sixth Amendment does it say that a conviction obtained in violation of the right to counsel cannot stand. But such was the result in Gideon v. Wainwright, 372 U.S. 335 (1963), as well as hundreds of decisions following in its wake. In each of these instances, and many others, once this Court has found the substance of a constitutional right has been denied, the impropriety of permitting the government the advantage of the deprivation has been so self-evident that the question is rarely raised outside the context of harmless error.

Indeed, to say that the exclusionary rule is but a "matter of judicial implication" is to do little more than to describe the function of this Court in constitutional interpretation. As Professor Kamisar has noted, disparaging the exclusionary rule as "judicial implication" is not "much of a point . . . unless somebody can cite me one Supreme Court case interpreting the Constitution that is not 'a matter of judicial implication.'" Kamisar, supra at 16. Indeed, this Court "cannot escape the demands of judging or making difficult appraisals." Haynes v. Washington, 373 U.S. 503, 515 (1963). It is its task to determine what the constitution commands beyond that which it literally says. The rationale for the exclusionary rule was forthrightly explained in Weeks: "If letters and private documents can thus be seized and held and

used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value, and, . . . might as well be stricken from the Constitution." Weeks v. United States, 232 U.S. 383, 393 (1914). That Court was unaware of any extraordinary "judicial implication" on its part when it concluded that "[t]he efforts of the courts and their officials to bring the guilty to punishment . . . are not to be aided by the sacrifice of [Fourth Amendment] principles." Id. at 393. Six years later, Justice Holmes found this reasoning compelling in speaking for the Court: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." Silverthorne Lumber Co. v.

United States, 251 U.S. 385, 392 (1920). Indeed, the application of the exclusionary rule after the fact of the constitutional violation is conceptually indistinguishable from the requirement that the Fourth Amendment protections be complied with prior to the issuance of a warrant to prevent a constitutional violation. In the latter case, a violation of the Fourth Amendment may be forestalled; in the former, the design is to resume the status quo ante, as if the search had not occurred.

II. THE ADOPTION OF A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE WOULD BE ANTITHETICAL TO THE PROTECTION OF LIBERTY MANDATED BY THE FOURTH AMENDMENT

A. The adoption of a good faith exception to the exclusionary rule would effectively diminish the substantive protection of the Fourth Amendment.

The refusal of a court to exclude evidence from a criminal trial when that

evidence has been obtained as the result of a violation of the Fourth Amendment, is nothing less than a refusal to honor a constitutional right. This is true even if a civil rights action is available to vindicate the deprivation, or if internal disciplinary sanctions are invoked against the offending officer. If the evidence is used to convict, then the constitutional right, that is the constitutional limitation upon governmental action, has been denied. The logic of the foregoing has never been questioned in the context of confessions: an involuntary confession may not be introduced in evidence. That the events that produced the confession might give rise to a tort claim, or an action for damages for the deprivation of a civil right, or the disciplining of the responsible offi-

cials, has no bearing on the admissibility of the confession at a criminal trial.

No member of this Court has taken the view that under no circumstances should illegally seized evidence be excluded. Justice Frankfurter dissented from the holding of this Court in Mapp v. Ohio, 367 U.S. 643 (1961), yet he wrote for a unanimous Court in Rochin v. California, 342 U.S. 165 (1952), excluding evidence obtained by non-consensual stomach pumping. The lesson of Rochin is that at some point, any constitutionally sensitive judge "will not care about or even think about 'alternatives' to the remedy of exclusion; he will exclude the evidence however logically relevant and verifiable it be, or, if the court below admitted it, he simply will not let the conviction stand." Kamisar, supra at 30. The question, therefore, is not

whether there should be an exclusionary rule but where the line should be drawn.

In the past, Justices have disagreed as to when the Fourth Amendment should apply, substantively and jurisdictionally. The present dispute, however, begins with the assumption that a violation of the constitutional protection has occurred but maintains that under some circumstances the exclusionary rule nevertheless should not apply. Should this Court adopt any exception to the exclusionary rule, it would be tantamount to holding that certain violations of the Fourth Amendment—although most assuredly violations—are not deserving of protection. For all practical purposes, this is simply to say there was no violation at all. In no other area of constitutional rights has this Court held that a deprivation has occurred but vindication

was unnecessary. In the words of one commentator:

> Does a court that admits the evidence in such a case not manifest a willingness to "put up with" the unconstitutional conduct that produced it? If so, how can the police and the citizenry be expected "to believe that the government truly meant to forbid the conduct in the first place"?

Kamisar, supra at 33 (quoting Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 U. Crim. L.C. & P.S. 255, 258 (1961)). A deliberate and egregious deprivation of a Fourth Amendment right is obvious, and exclusion of evidence so obtained is not criticized by even ardent supporters of a good faith exception to the exclusionary rule. But any violation of a constitutional right, no matter how subtle, cannot be ignored. Indeed, the less flagrant violations may well be those for which the exclusionary rule is most important. As one commentator has

noted, "The more violent and obvious infringements may be curtailed through civil or criminal actions against the guilty officers." (emphasis added). Atkinson, Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures, 25 Colum. L. Rev. 11, 24 (1925). If good faith violations of the Fourth Amendment are not interdicted by the exclusionary rule, they will not be curtailed at all.

B. The adoption of a good faith exception to the exclusionary rule would curtail the development of Fourth Amendment law

The landmark cases which have shaped the meaning of the Fourth Amendment have reached this Court only because the victims of certain law enforcement methods have been convicted of crimes by use of evidence allegedly obtained in violation of the Fourth Amendment. The ultimate

question in many of the more significant precedents—Terry v. Ohio, 392 U.S. 1 (1968); Chimel v. California, 395 U.S. 752 (1969): Delaware v. Prouse, 440 U.S. 648 (1979); Katz v. United States, 389 U.S. 347 (1967); Payton v. New York, 445 U.S. 573 (1980); Chambers v. Maroney, 399 U.S. 42 (1976); Spinelli v. United States, 393 U.S. 410 (1969)—was the same: whether seized evidence should be excluded from the trial of the accused. In some of these cases the government prevailed; in others the accused was vindicated. But—and this is the important point—in all of these cases most observers would agree that the challenged acts of law enforcement officers were carried out in good faith.

Had a good faith exception to the exclusionary rule been in effect at the time these cases arose, it is doubtful

that most of them would have achieved any precedential significance. Judicial restraint counsels that courts avoid answering constitutional questions. (See Ashwander v. T.V.A., 297 U.S. 288, 341, 346-48 (1936) in which the concurring opinion of Justice Brandeis summarized the practice of this Court in avoiding constitutional questions. "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." Id. at 347.). It follows that once the good faith of the officers has been determined and the evidence held to be admissible, there is no need to decide if a constitutional right was actually violated.

Even assuming courts would determine the constitutionality of the officer's

behavior, the case may never reach even a lower appellate court let alone the Supreme Court. See Mertens & Wasserstrom, supra, at 449-54. For example, in Terry, it would have been pointless for the defense to appeal the questions to this Court, for if anything is clear in the Terry case, it is that Officer McFadden is a model patrolman, responding to a set of suspicious circumstances in a highly professional, efficient and humane manner. Because a finding of good faith is inevitable, there would be no incentive for the accused to appeal, even if there were a strong possibility of success on the substantive issue.

The result in the case might be the same, but this Court would have been denied the opportunity to address an important, and at the time of Terry, highly confused issue: the application of the

Fourth Amendment to confrontations between law enforcement agents and suspects which fall short of arrest and search. By its careful examination of the questions in Terry, this Court did more than give its approval to the tactics involved in a particular field investigation. It gave stop and frisk practices general constitutional approval. It approved guidelines where none had previously existed for the instruction of law enforcement personnel in field investigation procedures. In the fifteen years since Terry, thousands of appellate decisions from every jurisdiction have relied upon its standards in scrutininzing field detentions and frisks, and in the overwhelming majority of cases, the government has prevailed. See Cook, Constitutional Rights of the Accused: Pretrial Rights #7, at 55 n.10

(1972 & Supp.) This opportunity to provide meaningful parameters on the Fourth Amendment would have been lost had Terry gone unlitigated at the appellate level or unexplored by this Court in light of the good faith of the arresting officers. The same may very well be true in virtually every case in which this Court has made significant pronouncements on the meaning and scope of the Fourth Amendment. See Mertens & Wasserstrom, supra at 401 et. seq.

C. The adoption of a good faith exception to the exclusionary rule would significantly diminish the motivation for institutions of law enforcement to govern their conduct by Fourth Amendment standards

A major thrust of the argument favoring a good faith exception to the exclusionary rule is that, so long as law enforcement officers have acted in good faith in executing their duties, nothing

will be accomplished by excluding the evidence obtained even illegally, because the reasonable belief of the officer in the legality of his or her conduct precludes a deterrent effect. While the deterrent effect of the exclusionary rule should not be the dispositive question before this Court, the argument in any event fails to credit what Mertens and Wasserstrom have identified as "systemic deterrence." Mertens & Wasserstrom, supra at 399 et seq.

Consider, for example, the decision in Delaware v. Prouse, 440 U.S. 648 (1979). There, this Court held that the "unbridled discretion" of a police officer in stopping at random an automobile to check the validity of the license of the driver could not be countenanced under the Fourth Amendment. While the dissent in Prouse observed that there was

no allegation or evidence of abuse of discretion by the police officer, the majority of this Court was convinced that the potential for abuse was enough. Reversing the conviction because evidence obtained in violation of the Fourth Amendment had been admitted at trial, this Court used the opportunity to suggest that roadblocks set up to check the licenses of all drivers passing a particular point during a particular time period would not run afoul of the constitution, Delaware v. Prouse, 440 U.S. 648, 663 (1979), and the concurring opinion added the caveat that something short of stopping all vehicles--every third vehicle, for example--would be acceptable as well.

There would appear little reason to doubt that the arresting officer in Prouse acted in good faith. Had a good

faith exception to the exclusionary rule been employed to resolve that case, the constitutionality of the stop might never have been addressed. Even if the trial court did address the constitutional question, if a good faith exception were allowed and its application were fairly inevitable, the case would never have been appealed. Thus, law enforcement officers would still not know whether random traffic stops were constitutional, a determination that needed to be made, considering the uncertainty in that area of law enforcement. See cases cited in Delaware v. Prouse, 440 U.S. at 651 nn. 2-3.

An even more ominous outcome could easily have resulted from the application of the good faith exception in Prouse. The message would be clear: the random stopping of an automobile with no partic-

ularized suspicion to check a driver's license violates the Fourth Amendment but if the defendant cannot demonstrate that the officer acted in bad faith in selecting him for the check (based, for example, on his race, or age, or the type motor vehicle), any evidence of crime fortuitously discovered will be admissible, notwithstanding the constitutional violation. This might encourage some law enforcement agencies to fail to communicate the most recent relevant constitutional decisions to their personnel. The same lack of knowledge on the part of police may result even absent an intentional withholding of information. For example, in a rural setting police may not have the resources or the institutional structure to inform themselves of the latest constitutional mandates. In either event, if the policeman "on the

beat" did not know that his selection of a car based on his "unbridled discretion" was unconstitutional and the defendant could not prove obvious bad faith, the policeman would surely testify to his own subjective good faith, and the evidence, even though obtained clearly in violation of the constitution, would be admissible. In short, the application of the good faith exception in Prouse may well encourage unconstitutional behavior so long as it is done in an acceptable manner.

This is, of course, not what this Court did in Prouse. It held the practice unconstitutional, and it excluded the evidence. The message to law enforcement officers was clear: random stops of motor vehicles without particularized suspicion will not be tolerated. License checks of motorists, without par-

ticularized suspicion, are nevertheless permissible if the element of unbridled discretion is removed. Stated simply, Prouse told law enforcement officials how to and how not to go about achieving what was concededly a legitimate objective. Implementation of the guidelines enables the police to obtain the information they seek while ensuring the protection of constitutional rights.

In the years since Prouse, the decision has frequently provided the controlling precedent in license check cases in the lower courts. Sometimes convictions have been reversed for the same reasons this Court reversed Prouse. See e.g., Keenan v. State, 372 So.2d 1012 (Fla. Dist. Ct. App. 1979) (unreasonable stop under Prouse); People v. Kunath, 99 Ill. App. 3d 201, 425 N.E.2d 486 (1981) ("stop of the car was more in the nature of a

mere hunch . . . rather than on specific and articulated facts . . ."); State v. Hilleshiem, 291 N.W.2d 314 (Iowa 1980); State v. Wilson, 388 So.2d 744 (La. 1980); Goode v. State, 41 Md. App. 623, 398 A.2d 801 (1979); State v. Westbrook, 594 S.W.2d 741 (Tenn. Crim. App. 1979). In other cases, however, law enforcement agencies have followed the guidance provided in Prouse, and convictions obtained as a result of evidence seized during license checks have been sustained, not because the officers acted in good faith, but because they had acted in a wholly constitutional fashion. See e.g., United States v. Pritchard, 645 F.2d 854 (10th Cir.), cert. denied, 454 U.S. 832 (1981); People v. Carlton, 81 Ill. App. 3d 738, 402 N.E.2d 310 (1981); People v. John BB., 56 N.Y.2d 482, 438 N.E.2d 864, 453 N.Y.S.2d 158 (1982); State v. Shankle, 58

Or. App. 134, 647 P.2d 959 (1982). Indeed, Prouse has been used for direct guidance in some police departments. For example, "The written policy of the Roxbury (New Jersey) Township police department is to stop every fifth vehicle during certain light traffic hours." State v. Coccomo, 177 N.J. Super. 575, 579, 427 A.2d 131, 133 (1980). The court noted in a footnote that "In September 1979, the Morris County Prosecutor strongly urged each municipal police department to adopt rules and procedures to adjust their police practices to the Prouse proscriptions. Along with a summary of Prouse, a set of regulations approved by the Attorney General of New Jersey was also forwarded to the chiefs." Id. at n.1. The evidence was not suppressed in the case, because the procedures adopted and used by the police were reasonable and consti-

tutional. See also Mertens & Wasserstrom, supra at 399-401, for an account of similar actions taken by the District of Columbia Metropolitan Police.

The desirability of providing police with guidance so they may obtain information they need without fear of it being found inadmissible is self-evident. This interaction between the holding of this Court and law enforcement agencies has led to the optimum result. The Fourth Amendment rights of motorists have been articulated clearly, while the practical needs of law enforcement have been given their due.

D. The adoption of a good faith exception to the exclusionary rule in cases involving an improperly issued warrant would seriously erode the protection of the Fourth Amendment

The adoption of a good faith exception to the exclusionary rule would appear to reach its highest level of plau-

sibility in cases such as the one presently before this Court in which the officer has sought and obtained a warrant before carrying out the search. When acting pursuant to a judicial order, which will carry a presumption of validity, the officer has every reason to believe the search is constitutional. This Court has always favored the use of warrants, Terry v. Ohio, 392 U.S. 1, 20 (1968); United States v. Ventresca, 380 U.S. 102, 106-7 (1965); United States v. Lefkowitz, 285 U.S. 452, 464 (1932), and has implied a more lenient standard of probable cause might be appropriate when a warrant is obtained. In Aguilar v. Texas, 378 U.S. 108 (1964) this Court stated that "when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence

of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant.'" Id. at 111 (quoting Jones v. United States, 362 U.S. 257, 270 (1960)).

From this it might be argued that, but for the rare case of fraud or collusion, searches made pursuant to warrants are made in good faith. The result would be that evidence obtained in virtually all warrant searches would be admissible, not because supported by probable cause, but simply because made in good faith.

Such a result could hardly be more antithetical to the Fourth Amendment. The Amendment states categorically that ". . . no warrants shall issue, but upon probable cause." U.S. Const. amend. IV. It follows that any warrant issued without the requisite probable cause is con-

stitutionally void and cannot provide justification for a search, and this Court has consistently so held. Franks v. Delaware, 438 U.S. 154 (1978) (if material in an affidavit is found to be false and set aside and the "remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Id. at 156); Aguilar v. Texas, 378 U.S. 108 (1964)("the search warrant should not have been issued because the affidavit did not provide a sufficient basis for a finding of probable cause and . . . the evidence obtained as a result of the search warrant was inadmissible. . ." Id. at 115-16). Nothing in the Fourth Amendment suggests that the requirement of probable cause

can be replaced by good faith, and this Court has repeatedly held on the issue of probable cause that good faith can add nothing to facts which fail to satisfy that requirement. Beck v. Ohio, 379 U.S. 89 (1964); Henry v. United States, 361 U.S. 98 (1959). As this Court observed in Terry v. Ohio, 392 U.S. 1 (1968):

> And simple "'good faith on the part of the arresting officer is not enough.'. . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."

Id. at 22 (quoting Beck v. Ohio, 379 U.S. 89, 97 (1964)). See also Hill v. California, 401 U.S. 797 (1971) ("subjective good-faith belief would not in itself justify either the arrest or the subsequent search." Id. at 804). To admit evidence seized under a warrant unsupported by probable cause would substitute

good faith for the explicit requirements of the Fourth Amendment and render judicial review of warrant affidavits superfluous absent an allegation of bad faith on the part of the officer or issuing magistrate.

CONCLUSION

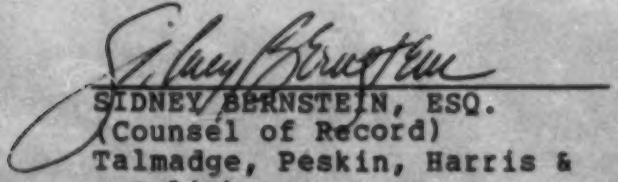
Nearly thirty years ago, substantial commentary was generated by a footnote to this Court's opinion in Brown v. Board of Education, 347 U.S. 483 (1954), which had led some to the conclusion that racially segregated public schools were unconstitutional because such schools were empirically shown to be deleterious to the education of black school children. Commentators admonished the "dangerous precedent" if Brown turned upon the vagaries of the evidence of social scientists. See Cahn, Jurisprudence, 30 N.Y.U.L. Rev.

150 (1955); Wechsler, Principles, Politics and Fundamental Law: Selected Essays, "Toward Neutral Principles of Constitutional Law," 43-47 (1961). Subsequent decisions of this Court made clear that these fears were unwarranted. Racially segregated facilities were unconstitutional for reasons of constitutional principle: the equal protection clause of the Fourteenth Amendment did not countenance racial classifications.

A comparable choice arises in the issue presented to the Court in this case. Advocates of an exception to the exclusionary rule wish to confine the enforcement of the Fourth Amendment to those cases in which a deterrent effect upon law enforcement practices can be shown. Just as the Equal Protection clause is not addressed to maximizing the quality of education, so the Fourth

Amendment is not concerned solely or even primarily with regulating the future behavior of law enforcement officers. To so hamstring the Fourth Amendment by the principle of utility would deny its stature as a fundamental constitutional right which, like all other provisions of the Bill of Rights, requires no other justification for rigorous enforcement and, therefore, for the foregoing reasons, Amicus Curiae, the Association of Trial Lawyers of America respectfully submits that the judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 1983, true and correct copies of the foregoing Brief for Amicus Curiae, The Association of Trial Lawyers of America, were deposited in the United States Postal Service with first class postage prepaid and properly addressed to the following counsel for parties to this appeal:

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Amicus Brief

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No. 81-430

FEB 14 1983
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

October Term, 1982

THE STATE OF ILLINOIS,

Petitioner,

vs.

LANCE GATES and SUSAN GATES,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR THE COMMITTEE ON CRIMINAL LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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Question Presented

Whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment should to any extent be modified so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

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BRIEF FOR THE COMMITTEE ON CRIMINAL LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE SUPPORTING AFFIRMANCE

Interest of the Amicus Curiae

This brief is respectfully submitted on behalf of the Committee on Criminal Law of the Association of the Bar of the City of New York.*

The Association of the Bar of the City of New York was established in 1871 "for the purposes of cultivating the

* This brief is filled with the consent of both parties to this case, pursuant to Rule 36.2 of the Rules of this Court.

science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, [and] elevating the standard of integrity, honor and courtesy in the legal profession. . . ." (Charter, April 28, 1871). The Committee on Criminal Law is one of the Association's standing committees. Its jurisdiction includes evaluation and comment upon proposals affecting criminal law and procedure in the state and federal courts. The Committee is composed of attorneys in all parts of the legal profession who have broad experience in the field of criminal law. The Committee's concern about the maintenance of the exclusionary rule is based not only on its concern for the preservation of Fourth Amendment values but, more particularly, its concern for maintaining the distinctive role of the courts in declaring and enforcing constitutional principles.

Summary of Argument

The Committee on Criminal Law of the Association of the Bar of the City of New York respectfully submits this brief in order to urge the Court not to modify the exclusionary rule and, more particularly, not to adopt a so-called "good faith" exception. We believe that the exclusionary rule is vitally important in our system of constitutional government. First, the moral authority of our courts would be seriously undermined if they permitted their judgments in criminal cases to be based on evidence obtained in a manner which the courts themselves have declared to be in violation of the Constitution. Second, the exclusionary rule provides the occasion by which the courts articulate and transmit to the public and to the law enforcement

community the doctrines and values which underly the Fourth Amendment. The sanction of exclusion makes meaningful what the court articulates. In this way, we believe that the exclusionary rule both deters unlawful conduct and, perhaps more importantly, fosters a more general respect for constitutional values.

In Point I below, we explain in more detail why we think the exclusionary rule is so important. In Point II below, we argue that a good faith exception is not simply a minor alteration or adjustment. In fact, if adopted, the good faith exception will destroy the salutary purposes of the exclusionary rule and undermine the values of the Fourth Amendment itself.

POINT I

The Exclusionary Rule Protects Significant Constitutional Rights and Values.

A. The Exclusionary Rule Protects the Integrity of the Judicial Process.

The idea that the exclusionary rule protects "judicial integrity" has been repeated so often that perhaps, through repetition, its meaning has been lost. In our view, the exclusionary rule is required by the Fourth Amendment itself. Even if it is only a remedial device, it is not one which the Court is free to adopt or reject simply on the basis of pragmatic calculations. The exclusionary rule is centrally important to our system of constitutional government precisely because, and to the extent that, our courts are important to that system.

In our system of constitutional adjudication, the courts sit as the final arbiters of the lawful limits of governmental authority. The legislature, the police officer, and the magistrate are each sworn to uphold the Constitution, but the acts of each of them are subject to final review by the courts. That power of final constitutional adjudication of the acts of other branches of government carries with it the obligation to ensure that the courts themselves act always in strict conformity with the Constitution. The courts cannot credibly declare that the action of a police officer violates fundamental constitutional norms, while at the same time making full use of that unconstitutional action in the judicial process.

When a court admits into evidence the fruits of a search, it participates in that search by legitimizing it, not only in the eyes of the searching officer but also in the eyes of the public. For this Court to determine that the exclusionary rule is too costly, that pragmatic considerations compel the courts to accept and legitimize the fruits of unconstitutional searches, would be to demean the role of the courts. The judiciary now stands as the single institution in our governmental structure that declares our constitutional ideals, untainted by convenience, politics, and the passions of the moment. To require the judiciary to calculate cost and convenience would strip it of the moral authority to overrule other branches of government.

As this Court has previously recogniz d, in criminal cases rulings on evidentiary matters frequently provide the occasion in which the courts either approve or disapprove governmental action.

> Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and

> exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

Terry v. *Ohio*, 392 U.S. 1, 13 (1968).

The exclusionary rule protects this vital function. Without it, the courts would be put in a position of legitimizing conduct which they have found to violate the Constitution. Frankly, we wonder how the moral authority of our courts could long survive the hypocrisy of declaring governmental conduct so repugnant as to violate the Constitution and at the same time legitimizing that conduct by admitting its fruits into evidence.

It is this hypocrisy which the courts have sought to avoid by creating the exclusionary rule. In the first case establishing the exclusionary rule this Court based the rule on the compelling need to protect the integrity of the judicial process. As this Court stated in *Weeks* v. *United States*, 232 U.S. 383, 392-93 (1914):

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, . . . , should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights . . .

In *Elkins* v. *United States*, 364 U.S. 206 (1960), this Court discussed the exclusion of evidence in terms of the

"imperative of judicial integrity" which holds that the federal courts not be "accomplices in the willful disobedience of a Constitution they are sworn to uphold." (364 U.S. at 223). In *Mapp* v. *Ohio*, 367 U.S. 643, 659 (1961), where this Court applied the exclusionary rule to the states, the Court continued to stress this principle of judicial integrity:

> The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. (footnote omitted).

And, in *Terry* v. *Ohio*, 392 U.S. 1, 12-13 (1968), this Court stated that in addition to the deterrent function:

> The rule also serves another vital function—"the imperative of judicial integrity." Elkins v. United States, 364 U.S. 206, 222, 4 L.Ed.2d 1669, 1680, 80 S.Ct. 1437, 1447 (1960). Courts which sit under our Constitution cannot and will not be made a party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.

It has become fashionable to denigrate the exclusionary rule by referring to the oft-quoted words of Judge Cardozo that the criminal shall not be freed because the constable "blundered." This view, we respectfully urge, misses the point. When the police or other governmental agents violate the Fourth Amendment they do not merely "blunder." They violate our charter of liberties. The courts cannot be the guardians of these liberties at the same time that they participate in the constitutional violations which endanger these liberties.

Moreover, the Court does not write on a clean slate, choosing among alternative interpretations of the Fourth Amendment. If it eliminates or attacks the exclusionary rule, it will be taking a clear step away from existing law. It blinks reality to suppose that a substantial limitation of the exclusionary rule at this time would be taken as anything other than a signal that the Fourth Amendment has been reduced in importance, and that violations of its commands are now to be countenanced as a necessary cost of effective law enforcement.

We recognize that in recent years this Court has chosen to emphasize other functions of the exclusionary rule. (*See* section B *infra.*) However, the Court has never repudiated the imperative of judicial integrity as an important reason for excluding evidence obtained in violation of the Fourth Amendment. *See United States* v. *Janis,* 428 U.S. 433, 458 n.35 (1976). We urge the Court in this case to recognize again this important purpose of the exclusionary rule.

B. The Exclusionary Rule Encourages Lawful Conduct and Discourages Unlawful Action.

Many critics, and even some supporters, of the exclusionary rule have come to focus their attention on the question whether the rule "deters" unlawful governmental conduct. The arguments on both sides appear to be based on extremely simplistic ideas of why governmental agents do or do not attempt to follow the law. Supporters of the rule sometimes say that the exclusionary rule "punishes" the police who violate the law by not permitting the fruits of their labors to be used in court. Thus punished, the officer will attempt in the future to conform his behavior to the commands of the courts. Critics counter that the police

often have goals different from or in addition to the conviction of a defendant. Excluding evidence will therefore have very little effect on such behavior. Both these arguments seem to assume that law enforcement officials will not obey the law unless they are induced to do so by some coercive means.

These arguments simply ignore the immensely complicated questions of how constitutional values are articulated, translated and reinforced in our society, how governmental officials receive and internalize these values, and how this process affects their behavior. We believe that the exclusionary rule is critically important in this process. The exclusionary rule provides the means by which courts articulate standards for constitutionally permissible conduct and transmit those standards to the public and to the law enforcement community.

The exclusionary rule requires courts to explore and discuss daily the important questions of law and policy raised by the Fourth Amendment. Serious consequences attach to the courts' decisions—the admission or exclusion of evidence. Therefore, the questions faced by the courts cannot be treated simply as abstractions. Moreover, because under the exclusionary rule the courts must and do attach serious consequences to their pronouncements on the subject of whether or not the evidence was obtained lawfully, these pronouncements are bound to be given more weight by the public and by the law enforcement community.

As Justice Brandeis has said, "our government is the potent, the omnipresent teacher. For good as for ill, it teaches the whole people by example." *Olmstead* v. *United*

States, 277 U.S. 438, 485 (1928) (dissenting opinion). If the courts do not take seriously their own pronouncements that the government acted unconstitutionally, it is less likely that the public or the law enforcement community will respect these pronouncements.

Statements by important law enforcement officials indicate that the exclusionary rule does in fact have the effect of causing the law enforcement community to take more seriously the rules and values of the Fourth Amendment. Former New York City Commissioner Michael Murphy described the response in New York to the application in *Mapp* v. *Ohio* of the exclusionary rule to the states:

> [The police were] immediately caught up in the entire problem of reevaluating our procedures . . . and modifying, amending and creating new policies and new instructions for the implementation of *Mapp*. . . . Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily basic enforcement function.

Murphy, *Judicial Review of Police Methods in Law Enforcement: the Problem of Compliance by Police Departments*, 44 Texas L. Rev. 939, 941 (1966). Similarly, after California adopted the exclusionary rule, William Parker, then Chief of the Los Angeles Police Department, stated:

> As long as the Exclusionary Rule is the law of California, your police will respect it and operate to the best of their ability within the framework of limitations imposed by that rule.

Kamisar, *Is The Exclusionary Rule An "Illogical" Or The "Unnatural" Interpretation Of The Fourth Amendment?*

62 Judicature 66, 72 (1978), quoting from W. Parker, *Police* 117, 131 (Springfield, Illinois: C.C. Thomas) (Wilson ed. 1957).

As important as training programs and directives from police management may be, the exclusionary rule, we believe, affects law enforcement behavior in a more significant way. The exclusionary rule requires these officials to take seriously the questions raised by the Fourth Amendment. Throughout the country, police officers, prosecutors and other law enforcement officials are forced to discuss questions like: how much evidence do we need before we make this arrest; do we have enough evidence to obtain a warrant in this particular case; can we search this car, or this briefcase, or this desk, or this wallet, or this home? In effect, these public officials are discussing the fundamental values embodied in the Fourth Amendment. How much evidence is needed before governmental officials may invade a citizen's privacy? This dialogue would cease, we believe, without the exclusionary rule which requires police officers and prosecutors to care about how their conduct will withstand scrutiny in court.

The continuing, nationwide dialogue fostered by the exclusionary rule is the most effective way for our public officials to articulate, to learn about, and to internalize the values of the Fourth Amendment. A former federal prosecutor, and currently Attorney General of the State of Maryland, put the matter nicely as follows:

> When an assistant U. S. attorney, for example, advises an FBI agent that he lacks probable cause to search for bank loot in a parked automobile unless he gets a better make on the car, or that he has a staleness

> problem with the probable cause to believe that the ski masks used in the robbery are still in the suspect's girlfriend's apartment, or that he should apply for a search warrant from a magistrate and not rely on the consent of the suspect's kid sister to search his home—in all those circumstances, . . . the rule is working.
>
> The principal, perhaps the only, reason those conversations occur is that the assistant and the agent want the search to stand up in court. Episodes like these are commonplace. It was part of the routine of every Federal prosecutor with whom I have worked. Although my present office has more limited criminal jurisdiction, such police-prosecutor consultation is customary in all of our cases when fourth amendment concerns arise.
>
> I strongly suspect that scenes like these are repeated daily throughout Federal law enforcement and on homicide, narcotics, and gambling squads in cities throughout the country.

Statement of Stephen H. Sachs, Attorney General, State of Maryland, *Hearings Before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate,* 97th Cong., 1st and 2nd Sess. on S. 101, S. 751 and S. 1995 (1981 & 1982).

Critics of the exclusionary rule sometimes demean the arguments advanced above by claiming that there is no empirical proof that the rule, in fact, deters unlawful behavior or encourages lawful behavior. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives,* 37 U. Chi. L. Rev. 665 (1970). Other studies suggest that the rule does in fact deter unlawful behavior. *See* Canon, *Is the Exclusionary Rule in Failing Health? Some New Data*

and a Plea Against a Precipitous Conclusion, 62 Ky. L.J. 681 (1974).

Every study is subject to serious methodological criticism and to multiple conflicting interpretations. We may concede, at least for purposes of argument, that no definitive statistical study exists. The point, we think, is that the debate about the effectiveness of the exclusionary rule cannot be resolved by resort to empirical studies.

The arguments about empirical proof raised by critics of the exclusionary rule are reminiscent of arguments about the effectiveness of other sorts of rules in our society—for example, penal laws. We may not be able to prove by empirical study the deterrent effect of, for example, punishing tax evasion. But we do believe, because our collective experience confirms, that sanctions affect behavior in our society. They do so because they announce appropriate rules of conduct; they attach serious consequences to a failure to follow these rules; they reinforce those who follow the rules and disapprove of those who do not. Similarly, although we can make no claims about the effect of the exclusionary rule on a particular governmental official, our common sense and experience tell us that, on the whole, the rule affects behavior in such a way as to make lawful conduct more likely and unlawful conduct less likely. *See* Canon, *Ideology and Realty in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention*, 23 S. Tex. L.J. 559, 560-72 (1982).

POINT II

To Engraft a "Good Faith" Exception upon the Exclusionary Rule Would Undercut Both the Functions of the Rule and the Values of the Fourth Amendment Itself.

A. The "Good Faith" of the Officer Should Not Immunize from Review the Legality of a Search.

The most important point to be made about a so-called good faith exception is that, by definition, under its regime the courts will be required to use evidence which was obtained in violation of the Constitution. Thus baldly stated, the exception is seen not simply as a minor adjustment to the exclusionary rule but a major surgery. Engrafting a "good faith" exception upon the exclusionary rule would not only vitiate the purposes of the exclusionary rule; doing so will undercut the values of the Fourth Amendment itself.

Permitting the use of evidence obtained in "good faith" violation of the Constitution effectively turns the unwitting violation by the blundering constable into a wilful violation by the government and the courts. The courts, in the same breath that they declare the unconstitutionality of the seizure, deprive that declaration of any practical effect or meaning by approving such use of the wrongfully-seized evidence. "To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Weeks* v. *United States*, 232 U.S. 383, 394 (1913). A "good faith" exception would involve the courts in a

hypocritical exercise, thus materially undermining the integrity of the judicial process.

A "good faith" exception would also undermine the ways in which the exclusionary rule fosters lawful behavior and discourages unlawful behavior. Proponents of a "good faith" exception disagree and argue that prohibiting the use of evidence obtained in violation of the Constitution will not deter illegal conduct if the officers reasonably, though mistakenly, believed they were complying with the law.* This argument, we respectfully urge, simply misunderstands or ignores the ways in which the exclusionary rule accomplishes its goals.

As we have shown above, the exclusionary rule works in ways both more subtle and more varied than the simplistic model used by proponents of a "good faith" exception. The "strictness" of the exclusionary rule has caused law enforcement authorities to impose controls on the conduct of searches and seizures, including close supervision over permission to search, recourse to magistrates whenever possible and to prosecutors when not, intense education regarding Fourth Amendment requirements, and more. (*See, e.g.*, statements quoted *supra* at 9.) The felt need for such measures would be severely diminished by a "good faith" exception.

A "good faith" exception would, we think, entirely destroy the way in which, by inducing daily interchange among courts, prosecutors and police officers, the exclusionary rule fosters discussion about and attempts to comply with the Fourth Amendment. (*See supra* at 10-11.)

* See, for example, the arguments put forth in the *Final Report of the Attorney General's Task Force on Violent Crime* (1981).

Prosecutors and police officers preparing for suppression hearings will no longer be required to focus on the basic issue of whether the governmental conduct was lawful or not. It will simply be less important to ask whether, for example, the officer had enough information upon which to base an intrusion into some citizen's privacy. The question in the suppression hearing—and therefore in the discussions about and the preparation for such hearings—will be whether the police officer was a good or bad person and whether he understood the law or not. The more basic question of whether he in fact violated the law will be lost.

Moreover, a "good faith" exception would make it easier for certain bad-faith police conduct to escape the sanctions of the exclusionary rule. It is never an easy task for a court to declare that the police have blundered, especially when such a conclusion leads to the exclusion of evidence of criminal conduct by an accused. Nor is such a task made easier by the fact that criminal cases are frequently the subject of intense media coverage. Under the exclusionary rule in its present form, a court need only determine whether, as an objective matter, a particular search and seizure complied or failed to comply with Fourth Amendment requirements. Under the "good faith" exception, however, a court must instead focus on the subjective state-of-mind of the officer making the seizure and the comparative reasonableness of that state of mind.* Such deter-

* Thus, for example, the standard for the "good faith" exception seemingly advocated by Justice White in his dissent in *Stone* v. *Powell*, 428 U.S. 465 (1976), is met when an officer seizes evidence "in the good-faith belief that his conduct comported with existing law and [there are] reasonable grounds for this belief." *Id.* at 538 (White, J. dissenting).

minations are enormously difficult.* They also put a court in the position of having to brand the officer as a miscreant in order to reach the question of whether the Fourth Amendment has been violated. The Committee on Criminal Law of the Association submits that in such situations the pressures on judges to find compliance with the "good faith" exception will be great and that such findings—being largely addressed to subjective states-of-mind and being substantially based on considerations of demeanor and credibility —will be essentially unreviewable.

B. The Mere Issuance of a Warrant Should Not Immunize from Review the Legality of a Search.

This brings us, finally, to another shortcoming of a "good faith" exception—one particularly relevant to the instant case. Most proposals for a good faith exception focus entirely on the good faith of the officer, and not at all on the good faith of the magistrate who issues a warrant. Thus, except in extraordinary circumstances (such as when an officer provides a magistrate with a perjurious affidavit), any time a police officer seeks and obtains a warrant before

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* *See generally,* Uviller, *The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices In Transition,*" 35 Vanderbilt L. Rev. 501, 512 (1982):

> [Under a "good faith" exception] a court will have to review the policeman's judgment: was the sense of rectitude, however, sincere, legally sound? Was the officer's decision framed with sufficient awareness and consideration of the principles protecting the subject against the official inspection? Moreover, what are those principles to which the reasonable officer must defer in the exercise of "objectively" approved good faith? . . . If the admissibility of the evidence depends on the police officer's actual or supposed knowledge or understanding of finely wrought constitutional decisions of the courts, then the uncertainty and complexity of today's exclusionary determination has not only been perpetuated into the new era, it has been compounded.

conducting a search, he will thereby establish his reasonable good faith in conducting the search. All such searches conducted pursuant to a warrant will be immune from suppression, regardless of whether the magistrate wrongly issued the warrant. Indeed, in such a situation, the victim of an unconstitutional search will not even have a motive to challenge the search because the mere good faith of the police in seeking the warrant will bar suppression of the fruits of the search regardless of the validity *vel non* of the warrant. Thus, regardless of the validity of the warrant, review of the underlying search is effectively precluded.

This result will have many deleterious consequences. Under the exclusionary rule as it now exists, police officers and prosecutors have an incentive to consider carefully their basis for seeking a search warrant. Under a good faith exception, the incentive is removed. The mere application will virtually insure that the evidence obtained will be admitted in court. Under a regime of "good faith" it will be sufficient for the police officers and prosecutors merely to seek out the magistrate most inclined to grant a warrant, since even if he errs, the fruits of the search will be immune from suppression.* Magistrates vary widely, both within districts and throughout the country, in their training, experience and attention to Fourth Amendment values. Moreover, a magistrate in doubt as to whether or not to issue a warrant will have a strong motive to err on the side of issuance, since the results of the search will remain unaffected even if the warrant is later held invalid. For these reasons, among others, the Second Circuit has rejected a "good faith" exception similar to the one discussed

* *See* Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 Georgetown L. J. 365, 404 (1981).

here. *United States* v. *Karathanos*, 531 F.2d 26, 33-34 (2d Cir.), *cert. denied*, 428 U.S. 910 (1976).

The most serious consequence, however, is that such a "good faith" exception will undercut one of the important purposes of the Fourth Amendment. If the mere fact that a police officer seeks and obtains a warrant proves his good faith, and if that good faith is sufficient to defeat a claim of suppression, then, in effect, the magistrate issuing the warrant will have unreviewable discretion. His warrants would be, in practical effect, irreversible. "Unreviewable and irreversible errors of this magnitude offend justice." Uviller, *The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices in Transition*, *supra*, at 517.

This result turns the Fourth Amendment on its head. The office of the Fourth Amendment was not to insure that officers obtain warrants. Warrants, in themselves, were not perceived by the founding fathers (or their predecessors in England) to be valuable protections. To the contrary, the warrant was often viewed as an evil to be avoided.* Indeed, the prime evil which prompted the Fourth Amendment was the so-called "writ of assistance," which was a general warrant issued at the unreviewable discretion of a magistrate.**

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* *See* M. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* at 26 (1937); T. Taylor, *Two Studies in Constitutional Interpretation* at 38-44 (1968); *Wilkes* v. *Wood*, 19 Howell's State Trials 1153 (1763); *Entick* v. *Carrington*, 19 Howell's State Trials 1029 (1765).

** *See* T.M. Cooley, *The Treatise on Constitutional Limitations* at 368-9 (1927); 3 *Elliot's Debates on the Federal Constitution* at 448-49 (1836); 1 LaFave, *Search and Seizure: A Treatise On the Fourth Amendment* §1.1 (1978).

The general warrant permitted serious intrusions at the same time that it insulated the executing officers from civil liability. That is why the Fourth Amendment was not meant to be a monument to the virtue of warrants. It is, and was meant to be, a limitation on the ability of state officials to obtain warrants.* Under our Constitution, police officers are told that they cannot obtain and execute warrants, and magistrates are told that they cannot issue them, unless they are based upon "probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *See also Boyd* v. *United States,* 116 U.S. 616, 630 (1885). Thus, a good faith exception which makes a warrant presumptive evidence of admissibility would effectively rewrite the history, and undercut the purpose, of the Fourth Amendment itself by returning to magistrates the unreviewable discretion which the Fourth Amendment was meant to remove.

C. Occasional Erroneous Suppression Rulings Provide No Reason to Adopt a "Good Faith" Exception to the Exclusionary Rule.

Some proponents of the "good faith" exception suggest that it is not a major departure from present law. For example, the Solicitor General argues that it would merely require the court to determine "whether a reasonably well-trained police officer should have known, in light of the extant principles of law, that his conduct was prohibited. The inquiry will thus not be markedly different from that required of a court in deciding a suppresion motion." (Solicitor General's Brief at 7.)

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* *See* Martens & Wasserstrom, *supra,* at 374, n.43.

If that formulation is meant to limit inquiry into the reasonableness of the officer, and to exclude inquiry into the reasonableness of the magistrate who issued the warrant, then it is wrong for the reasons set forth above. If, on the other hand, the "good faith" exception is meant to focus on the objective reasonableness of police officers and magistrates and other officials rather than arcane technicalities, then the Solicitor General's argument is misdirected. Much of the impetus for a good faith exception seems to come from judicial decisions excluding evidence that resulted from eminently reasonable police conduct. *See, e.g.*, Solicitor General's brief at 27, n.8 and 38, n.19. We agree that in the corpus of Fourth Amendment jurisprudence there may be many examples of erroneous decisions, in which courts have held unconstitutional the reasonable acts of police officers, magistrates, and other governmental officials. It is tempting to urge that these erroneous rulings be deprived of effect by limiting the exclusionary rule. But the proper response to that problem is not the hypocrisy of retaining the rulings and stripping them of their consequences. Instead, the underlying rulings should be brought into conformity with standards of reasonableness. It should be a logical impossibility for a search to be both unreasonable enough to be unconstitutional and reasonable enough to qualify for any "good faith" exception. A reasonable search should satisfy the Constitution.

The occasional errors made by courts in ruling on suppression motions should not be permitted to divert our attention from the important values of the Fourth Amendment. When there is a genuine violation of the Fourth Amendment, the courts should not permit the evidence to be

used. Excluding unlawfully obtained evidence encourages lawful activity, discourages unlawful activity, and reinforces the central role of courts in declaring and enforcing constitutional principles. Engrafting a "good faith" exception upon the exclusionary rule would trivialize not only the rule itself but also the Fourth Amendment rules it seeks to protect.

Conclusion

Therefore, we respectfully urge the Court not to modify the exclusionary rule, and, more particularly, not to adopt a "good faith" exception to the exclusionary rule.*

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* This brief represents the views of a substantial majority of the Committee. Further, because of their public positions, some members of the Committee did not participate in the decision to submit this brief.

Amicus Brief

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No. 81-430

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

STATE OF ILLINOIS,

Petitioner,

vs.

LANCE GATES and
SUSAN GATES,

Respondents.

On Writ of Certiorari to the
Supreme Court of Illinois

BRIEF OF AMICI CURIAE STATE OF FLORIDA, ET AL. ON REARGUMENT

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QUESTION PRESENTED

Whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment?

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On Writ of Certiorari to the
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INTEREST OF AMICI CURIAE

The above-listed states, through their attorneys general, respectfully offer this brief in support of the State of Illinois. The amici will all be affected by the decision since this case involves the Fourth Amendment to the United States Constitution, made applicable to the states by Mapp v. Ohio, 367 U.S. 643 (1961). Many of the amici have state constitutions which have been construed in the search and seizure context to be identical to the Fourth Amendment to the United States Constitution. Indeed, Florida's constitutional prohibition against unreasonable searches and seizures expressly states that:

> This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.

Fla. Const. of 1968, Art. I, § 12 (1982).

Additionally, three of the amici have legislatively provided a good faith exception to the exclusionary rule. See Utah Code Ann. §§ 78-16-1 through 11 (Interim Supp. 1982); Ariz. Rev. Stat. Ann. § 13-3925; Colo. Rev. Stat. § 16-3-308. Obviously, the ruling in this case will affect these amici, as well as those states contemplating similar legislation.

The Washington Legal Foundation (WLF) is a private non-profit corporation dedicated to the public's interest in reducing crime and its impact on society. WLF joins this brief because its members agree with the attorneys general of the various signatory states that the exclusionary rule no longer serves the purpose of police officer deterrence and that the exclusion of evidence without regard to the culpability of law enforcement personnel is in derogation of the rights of law-abiding citizens.

SUMMARY OF ARGUMENT

As the exclusionary rule is now rigidly applied, it no longer serves to deter police misconduct or foster the integrity of the judicial system. Instead, the rule benefits only those who break the law, and the Court should modify the rule to make its application more consistent with the original reasons for the rule.

Because it is impossible to deter police officers from doing acts which they do not know, should not know, or cannot know are illegal, evidence should not be excluded when police officers act with both a reasonable and good faith belief that their conduct is lawful.

However, in all cases in which a neutral and detached magistrate has issued a search warrant which commands or authorizes that law enforcement officers conduct a search, evidence should not be

excluded because there is no way that the purpose of the rule can be served. The judiciary has actively encouraged law enforcement officers to obtain warrants, and it is not prudent to punish society's effort to obtain justice, thus benefiting only the criminal, because a judicial officer has improperly or incorrectly issued a search warrant. Therefore, unless the warrant was obtained by fraud or was improperly executed, evidence should never be excluded once a neutral and detached magistrate has issued a search warrant.

ARGUMENT

THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED WHEN THE EXCLUSION OF EVIDENCE WOULD FAIL TO SERVE THE RULE'S PURPOSE OF DETERRING POLICE OFFICERS FROM MISCONDUCT.

The exclusionary rule is a judicially created procedural safeguard applied to the benefit of criminal defendants. In recent years, some of the current members of the Court, as well as hundreds of other judges throughout the country, have questioned the continued viability of the rule in light of how the rule has been followed without regard to the question of guilt or innocence or more importantly without regard to the original purpose of the rule. Schneckloth v. Bustamonte, 412 U.S. 218, 267, n.24 (1973) (Powell, J., concurring). The time has come when the Court can no longer ignore the encouragement that blind adherence to the exclusionary rule affords the ever expanding criminal

component of our society. The rule should be modified, and the time is now.

A.

THE EXCLUSIONARY RULE SHOULD BE MODIFIED BECAUSE IT HAS OUTLIVED ITS PURPOSE.

It is now well settled that the primary purpose of the exclusionary rule is to deter police conduct which violates the Fourth Amendment. Stone v. Powell, 428 U.S. 465, 486 (1976). However, it is equally well settled from the enormous amount of controversy about the manner in which the rule has been applied that the rule no longer serves its original purpose. See e.g., Brewer v. Williams, 430 U.S. 387, 422 (1977) (Burger, C.J., dissenting).

The amici curiae submit that as the rule is now rigidly applied, it serves almost exclusively to punish society's law-abiding citizens while benefiting criminals whom the rule was never intended to serve. Why should criminals go free

because "the constable has blundered"? People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.).

It should be beyond peradventure that justice should be a truth seeking process -- however, as the rule is now inflexibly applied, it fosters disrespect rather than enhancing the integrity of the judicial system which originally was a second reason for the rule. Stone v. Powell, supra at 428 U.S. 484. Thus, the rule is now causing precisely the same disrespect for the judicial process which it sought to eliminate!

As the rule is now applied, it does not distinguish between or among the extent of fourth amendment violations. Brown v. Illinois, 422 U.S. 590, 610 (1975) (Powell, J., concurring in part). Instead, once it is determined after the fact that the Fourth Amendment has been abridged,

evidence is excluded without regard to the culpability of the officer who seized it. How can an officer be deterred from doing something he does not know is wrong? This defies common sense.

Moreover, because police officers are insulated from the actual exclusion decision (e.g., sequestered at the suppression hearing or removed by time and distance from an appellate exclusion of evidence), the purpose of police deterrence is defeated because officers may never learn how or why the evidence was excluded. Instead, law enforcement officers are likely to blame the judiciary, the prosecutor, or "the system," thus obliterating any chance of inspiring confidence in the judicial system, which was the second reason for the rule.

The frailty of the rule as it now exists can perhaps best be evidenced by the

fact that no other jurisdiction has adopted it. Only in America could a situation be tolerated in which if there has been one wrong, the defendant's, punishment will be swift, but where there have been two wrongs, the defendant's and an officer's, both will escape punishment. See Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 755 (1970). The present Administration has gone on record to support modification of the rule. Legislation to amend the judge-made exclusionary rule was pending at the close of the 97th Congress, and it is anticipated that similar legislation will be introduced during the 98th Congress.

A final reason that the exclusionary rule no longer serves its original purpose is that it discourages law enforcement officers from relying upon or following up citizen participation in crime prevention

and detection. In recent years, literally hundreds of crime-watch programs and other types of crime reporting methods relying upon citizen initiative have sprung up across the country. A blanket application of the rule, as was done by the Illinois appellate courts in this case, serves only to deter law enforcement officers from using what might ultimately turn out to be accurate information, just because the initial citizen tip was found in an anonymous letter or telephone call. Cf. Adams v. Williams, 407 U.S. 143, 147 (1972). Unquestionably, as the rule is inflexibly applied now, in such cases only society and justice, not the criminal, are punished. The time is now for the Court to change this situation.

B.

EVIDENCE SHOULD NOT BE EXCLUDED WHEN IT WAS SEIZED BY A POLICE OFFICER WHO HAD A GOOD FAITH BELIEF SUPPORTED BY OBJECTIVE REASONABLE GROUNDS THAT HIS CONDUCT WAS LAWFUL.

While there has been widespread agreement among law enforcement officers, prosecutors, judges, and even some of the defense bar that there are problems with the application and enforcement of the exclusionary rule, the question remains what should be done to the rule itself or the manner in which it is applied. The amici curiae are not urging the Court to take the drastic step of abolishing the exclusionary rule altogether, but rather, the various states are asking the Court to modify the rule in a common sense fashion which would still accomplish the rule's original objectives.

The Court should adopt an approach which eliminates the "all or nothing" rationale of the rule as it is now being applied. The amici submit that a better alternative would be a rule which would not order exclusion when the evidence was seized by a law enforcement officer acting in good faith with a reasonable belief supported by objective reasonable grounds that his conduct was lawful.

The Court has already adopted this type of approach in many varied situations involving evidence seized or obtained from improper searches and seizures. In Michigan v. DeFillippo, 443 U.S. 31 (1979), the Court upheld the admission of evidence which had been seized after an arrest which was later termed illegal only after the ordinance authorizing the arrest had been found unconstitutional. The Court recognized that "[a] prudent officer, in

the course of determining whether respondent had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional." Id. at 443 U.S. 37, 38. The Court noted that it was a police officer's duty to enforce laws until those laws are found unconstitutional, and the Court commented that society would suffer if police officers took it upon themselves to determine which laws were constitutionally entitled to enforcement. Id. at 443 U.S. 38.

In United States v. Peltier, 422 U.S. 531 (1975), a majority of the Court refused to apply the exclusionary rule to a border search when the statutory and regulatory authority for the search were found unconstitutional in a case that was decided long after the search had been conducted.

The Court specifically recognized that exclusion of evidence was not required when it would not serve the purpose of the rule because there had been absolutely no way for the law enforcement officers to know that their search was unconstitutional. Id. at 422 U.S. at 542.

Similarly, in Michigan v. Tucker, 417 U.S. 433, 447 (1974), a majority of the Court recognized that where police officers had acted "in complete good faith" the rule's deterrence rationale was not compelling enough to cause the exclusion of evidence even though the evidence had been indirectly obtained in violation of the Constitution because the defendant had not been Mirandized.

The Court has previously applied this same rationale in its retroactivity cases. In Linkletter v. Walker, 381 U.S. 618, 637 (1965), the Court refused to make

retroactive Mapp v. Ohio, 367 U.S. 643 (1961), which, of course, was the case which held that the exclusionary rule was applicable to the states in the first place. In Linkletter, the Court explicitly recognized that the application of the exclusionary rule retroactively "by the wholesale release of the guilty victims" [criminals] would not serve the rule's purpose of police officer deterrence. Id. at 381 U.S. 637. In other words, the Court implicitly recognized that police officers would not be deterred by the application of the rule at that late date because when their alleged "illegal conduct" had occurred, that conduct had not yet been judicially declared to be illegal. The rule was not applied retroactively because the reason for the rule would not have been served.

This logic is unaffected by the Court's more recent case of United States v. Johnson, ___ U.S. ___, 73 L.Ed.2d 202 (1982). That case is consistent with the rationale supporting a good faith exception because in Johnson, law enforcement officers should have been on notice for at least one month that a warrantless arrest in a home was illegal in that jurisdiction. Id. at 73 L.Ed.2d 216, n.15. Thus, a law enforcement officer who made a warrantless arrest could not have had both a good faith and reasonable belief that his conduct was lawful, and consequently, a good faith exception could not be justified under those circumstances. Had that not been the case, this Court might well have reached a contrary conclusion. See Desist v. United States, 394 U.S. 244 (1969); United States v. Peltier, supra.

Moreover, the same practice of not applying the harsh sanctions of the rule in situations where the purpose of deterring police officer illegal conduct would not be served can be found in the Court's standing cases. For example, in Rakas v. Illinois, 439 U.S. 128, 134 (1978), the Court refused to apply the exclusionary rule to the benefit of defendants whose fourth amendment rights had not been violated. See also United States v. Payner, 447 U.S. 727, 735 (1980), in which the majority of the Court refused to allow the suppression of otherwise admissible evidence which had been seized unlawfully from a third party not before the Court. The Court emphasized that the interest of deterring illegal searches would not be served by exclusion of the evidence at the "instance of a party who was not the victim of the challenged practices." Id.

In a similar vein, the Court has not seen fit to apply the exclusionary rule in the context of impeachment of a defendant's testimony at trial. In United States v. Havens, 446 U.S. 620, 628 (1980), the Court held that the rule's interest in police deterrence was outweighed by society's interest in reaching the truth at trial, and the Court allowed the prosecution to impeach the defendant's testimony with illegally obtained evidence which was inadmissible in the government's direct case. See also Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971); and Walder v. United States, 347 U.S. 62 (1954).

Also, the exclusionary rule has not been applied in federal civil proceedings even though the evidence was seized in violation of the Constitution. In United States v. Janis, 428 U.S. 433, 455 (1976),

Justice Blackmun wrote that there was no justification for extending the exclusionary rule to a federal civil proceeding based upon evidence unlawfully seized by a law enforcement officer who had acted in good faith:

> In short, we conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion. This Court, therefore, is not justified in so extending the exclusionary rule. (Footnote omitted.)

Similarly, the rule has not been applied to grand jury proceedings. United States v. Calandra, 414 U.S. 338 (1974). The Court noted that any possible "minimal advance in the deterrence of police misconduct" was outweighed by society's interest in not hampering the role of the grand jury. Id. at 414 U.S. 351, 352.

Thus, it is clear that the Court has already recognized the problems with the rule and the wisdom of not applying the rule in situations in which alleged police misconduct would not be deterred. However, the Court has not yet taken that last step and ruled that evidence should not be suppressed when it was seized by a police officer who was acting in a reasonable good faith belief, supported by articulable objective grounds, that the search and seizure was lawful. This case presents such an opportunity.

The Fifth Circuit Court of Appeals, sitting en banc, has already adopted the same good faith standard which the amici curiae submit should be made law nationwide. United States v. Williams, 622 F.2d 839, 847 (5th Cir. 1980), cert. denied, 449 U.S. 1127 (1981). The good faith exception to the exclusionary rule is

also the law in the Eleventh Circuit. Bonner v. Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

In Williams, the Fifth Circuit emphasized that it had modified the rule "only to conform that [the rule] to its underlying purpose: to deter unreasonable or bad-faith police conduct." Id. at 622 F.2d 847. The court also explained that the good faith exception would apply only if the officer's belief was both "bona fide and reasonable." Id. at 622 F.2d 843. Therefore, suppression would still result in cases in which the proponent of the evidence could not establish that the officer's belief was both in good faith and reasonable in light of the circumstances known to the officer at the time. In other words, the original purpose of the rule would still be served by exclusion of evidence in cases involving bad faith or

unreasonable conduct on the part of law enforcement officers.

The adoption of the good faith exception to the exclusionary rule by this Court would not be a decision which would strip unfortunate defendants of their constitutional rights. While protection against unreasonable searches and seizures may have its roots in the common law and, of course, the Constitution, the exclusion of evidence thus obtained is uniquely a product of the judicial system of the United States. Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, supra.

Moreover, practice in both the Fifth and Eleventh Circuits has conclusively demonstrated that the anguished outcries found in the rhetoric of those opposed to modifying the rule are unfounded. In fact, on March 16, 1982, the Senate Judiciary Subcommittee on Criminal Law heard

testimony on whether Congress should statutorily create a good faith exception to the exclusionary rule. Testimony before that Subcommittee established that there had been no abuses of the good faith exception to the exclusionary rule in either the Fifth or Eleventh Circuits as of that date.[1]

As Chief Justice Burger explained in his dissent in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 419, 422 (1971), a civil remedy against the offending officer would be more viable than the "universal 'capital punishment'" inflicted upon all illegally obtained evidence, regardless of

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[1]The Committee heard testimony that there had been 1,185 criminal filings in the Southern District of Texas, 119 criminal filings in the Southern District of Alabama, and 602 criminal filings in the Southern District of Florida. There was absolutely no empirical evidence or other type allegation that the good faith exception had been abused.

how it was obtained. Amici submit that police officer deterrence would be more likely to occur if offending officers (or their supervisors) were made civilly liable. In egregious cases, law enforcement officers would be much more likely to police their own since they would no longer be insulated from their conduct. See, e.g., Smith v. Hoath, 691 F.2d 220 (6th Cir. 1982), in which a supervisor was held liable under 42 U.S.C. § 1983 for damages resulting from fourth amendment violations. Also, at least one state has already statutorily authorized civil actions against law enforcement officers in lieu of exclusion of evidence resulting from fourth amendment violations. See Utah Code Ann. § 78-16-3 (Interim Supp. 1982).

Therefore, the predictions of doom forecast by those opposed to modifying the

rule have been proven to be unfounded both in common sense and in fact. There simply has yet to be any claim sustained by empirical evidence of the irreparable injury of any innocent citizen or group based upon a good faith exception to the exclusionary rule.

The Fifth Circuit has not been alone in establishing a good faith exception to the exclusionary rule. In State v. Mincey, 636 P.2d 637, 650 (Ariz. 1981), the Arizona Supreme Court sitting en banc held that the exclusionary rule was not applicable in situations in which a police officer had "proceeded in good faith reliance on the law in Arizona as he was advised by a legal expert." Similarly, the Louisiana Supreme Court followed Williams and adopted the good faith exception in upholding a search warrant based upon an affidavit from which material facts had been inadvertently but

in good faith omitted. State v. Lehnen, 403 So.2d 683, 686 (La. 1981). See also Gifford v. State, 630 S.W.2d 387, 391 (Tex.Crim.App. 1982), in which it was held that the exclusionary rule would not be applied when the "police misconduct was merely technical." The Supreme Court of Virginia has also indicated that it was persuaded by the reasoning of Williams. Holloman v. Commonwealth, 275 S.E.2d 620, 622 (Va. 1981). See also Drumheller v. Commonwealth, 29 S.E.2d 602, 605 (Va. 1982) (Poff, J. concurring). The Supreme Court of Vermont applied the same rationale the court used in Michigan v. DeFillippo, supra, when it refused to order suppression of evidence seized after a search based on an allegedly unconstitutional statute. State v. Harbaugh, 326 A.2d 821 (Vt. 1974).

Also, in a very recent search warrant case in which the judge erred in issuing a

warrant, the Massachusetts Supreme Court indicated that it wanted to apply a good faith exception to the rule. That court declined to do so only because it felt compelled to reverse in light of Coolidge. Commonwealth v. Sheppard, ___ N.E.2d ___, 32 Cr.L. 2158 (Mass., opinion filed Oct. 26, 1982). Moreover, at least one other federal court of appeals has adopted the rationale of Williams. See Robberson Steel Co. v. Occupational Safety and Health Review Comm., 645 F.2d 22 (10th Cir. 1980) (civil OSHA Enforcement Proceedings).

Moreover, at least three state legislatures have already adopted some type of statutory exception to the exclusionary rule. See Utah Code Ann. §§ 78-16-1 and 8 ("whether the conduct of the peace officer was in good faith"); Ariz. Rev. Stat. Ann. § 13-3925 ("evidence was seized by a peace

officer as a result of a good faith mistake or technical violation"); Colo. Rev. Stat. § 16-3-308 ("evidence was seized by a police officer...as a result of a good faith mistake or of a technical violation"). Also, the people of California, by initiative, have recently amended their constitution to prohibit exclusion of "relevant evidence." Cal. Const. Art. I, § 28(d).

The reasons for modifying the exclusionary rule to allow for the admission of evidence when seized in a reasonable and good faith belief that the seizure was lawful are compelling. The original purpose of the rule would still be effectuated since under the rationale of Williams the evidence would still be excluded if the officer's belief was not both reasonable and in good faith. The adoption of such an exception would restore

integrity to the judicial system while also serving justice by reinforcing the search for truth.

C.

EVIDENCE SHOULD NOT BE EXCLUDED WHEN A SEARCH WARRANT HAS BEEN ISSUED BY A NEUTRAL AND DETACHED MAGISTRATE.

Regardless of whether the Court accepts the assertion found in the previous section of this brief that evidence should never be excluded in any "good faith" search and seizure, the amici emphatically submit that the rule should never be applied in cases involving duly issued warrants, absent a clear showing of fraud by the affiant or the unreasonable execution of the warrant.[2]

In Johnson v. United States, 333 U.S. 10, 13-14 (1948), the Court held that evidence seized pursuant to a warrantless

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[2]Of course, evidence could still be excluded if the police lie or deliberately mislead the magistrate or if the warrant is improperly executed -- exclusion under those circumstances would still be consistent with the purpose of the rule. Franks v. Delaware, 438 U.S. 154 (1978). Mapp v. Ohio, supra.

arrest should have been suppressed because the police officers had enough time and information to obtain a warrant. The arrest had been made after law enforcement officers smelled burning opium in the hallway of a hotel and obtained permission from the occupant of the room from which the smell emanated to enter the room. The Court emphasized that:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. Cf. United States v. Lefkowitz, 285 U.S. 452, 464 (1932). See also Coolidge v. New Hampshire, 403 U.S. 443 (1971), in which the Court emphasized the importance of seeking from a neutral and detached

magistrate the approval to search. In that case, the search warrant had been issued by an attorney general who was also directing law enforcement efforts to find the perpetrator of a murder. Several years after Coolidge was decided, the Court again emphasized the importance of the role of a neutral and detached magistrate in the balance between society's right to thwart crime and a citizen's fourth amendment right against unreasonable searches and seizures. Gerstein v. Pugh, 420 U.S. 103 (1975).

Therefore, there is absolutely no way that the alleged purpose of the exclusionary rule i.e., to deter police misconduct, could ever apply in a search warrant situation (absent perjury or deceit by the officer seeking the warrant). See Brown v. Illinois, supra at 422 U.S. 612, Powell, J., concurring in part. This Court, as

well as all other aspects of the judicial system, has actively encouraged officers to seek warrants. In United States v. Ventresca, 380 U.S. 102, 106 (1965), Justice Goldberg explained that in previous cases:

> [T]his Court, strongly supporting the preference to be accorded searches under a warrant, indicated that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall. In Johnson v United States, 333 US 10 and Chapman v United States, 365 US 610, the Court, in condemning searches by officers who invaded premises without a warrant, plainly intimated that had the proper course of obtaining a warrant from a magistrate on the same evidence available to the police made a finding of probable cause, the search under the warrant would have been sustained.

Does it make sense then for the judiciary to exclude evidence under the guise of an unreasonable search and seizure when the police officer has obtained prior judicial approval for the search? Does it

make sense for the judiciary to exclude evidence after a judicial officer has issued a warrant which commands that a search and seizure be made? The amici submit that it obviously does not make sense, yet, as the rule is now applied, that is precisely what occurs daily all over the country. If the Court is not going to accord deference to its previous decisions which encouraged law enforcement officers to seek approval for searches Ventresca, supra, why should a police officer bother to go to a magistrate at all?

Moreover, as Justice White so aptly noted in his dissent in Payton v. New York, 445 U.S. 573, 619 (1980), law enforcement officers today are routinely called upon to make immediate on-the-spot "subtle discriminations that perplex even judges in their chambers." How then can it be considered

prudent to expect law enforcement officers to be deterred when evidence is excluded despite the fact that a neutral and detached magistrate authorized, and, in fact, commanded a search?

A striking example of the complexity of current search and seizure law is the controversy caused by the recent decisions of Robbins v. California, 453 U.S. 420 (1981) and Belton v. New York, 453 U.S. 454 (1981), which was not put to rest until United States v. Ross, ___ U.S. ___, 72 L.Ed.2d 572 (1982) was decided. It is significant to note that when Robbins was finally decided, fourteen judges had reviewed the search, and seven had found it valid and seven others had found it invalid. It is also significant to note that this Court resolved the legal ambiguity just the next term -- but during the interim how could the average police

officer on the street have been expected to understand the status of the law? Yet, from the time Robbins and Belton were decided until the matter was put to rest in United States v. Ross, amici submit that numerous criminal defendants who were otherwise guilty received the benefit of the "blunderbuss effect" of the exclusionary rule.

It is important to note that the rule of law sought by the amici can be made without the Court's having to overrule any prior cases. Since the judicial leap from exclusion of evidence in non-warrant cases to all fourth amendment cases was made without an explanation of why the rule was applicable, the Court has apparently never

addressed the issue.[3] United States v. Ross, supra, at 72 L.Ed.2d 593.

The application of the rule is especially harsh in this case because the police officers relied upon a search warrant issued by a neutral and detached magistrate. After receiving the initial anonymous letter, Illinois law enforcement officers went to great lengths to ascertain that the information was correct before attempting to obtain a warrant. This included obtaining information from a previously reliable confidential informant, information from the Illinois Secretary of State's Office, information from the Chicago Police Department agent assigned to O'Hare Airport, and information from a Drug

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[3] Nathanson v. United States, 290 U.S. 41 (1933); Giordenello v. United States, 357 U.S. 480 (1958); Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

Enforcement Administration Agent who had personally observed the Gates' activities in Florida. Amici ask what else could the law enforcement officers have done? Were they to sit by idly and allow a crime to occur? That is precisely the effect of the application of the rule in this case in which a warrant was obtained only after all the information and details were corroborated. Draper v. United States, 358 U.S. 307 (1959).

The fact remains that regardless from what perspective the anaylsis is made, it makes no sense to apply the exclusionary rule in cases in which law enforcement officers have in good faith obtained a search warrant from a neutral and detached magistrate. Law enforcement officers are not supposed to second guess judges who have commanded or authorized them to search a person or place. There is simply no

reason to apply the rule in a search warrant case because the reason for the rule, i.e., police deterrence, cannot possibly exist in a case in which a warrant has been properly issued. At least one commentator has recognized this. J. Fennelly, Warrant Searches and the Exclusionary Rule, A Rule in Search of a Reason (to be published in Notre Dame Law Review, Spring 1983).

Moreover, the Court has already established in Michigan v. DeFillippo, supra, that police officers could rely in good faith on legislative enactments subsequently judicially determined to be constitutionally infirm without the sanction of the exclusion of evidence. The argument is much more compelling that a police officer may in good faith rely upon a judicial determination that probable cause exists and that a warrant may

lawfully issue commanding execution of the warrant. United States v. Williams, supra, at 622 F.2d 841. If not, upon whom can he rely? And if not, why has this Court commanded that police seek prior approval by the judiciary to legitimize the warrant? Coolidge, supra. Moreover, police officers cannot take "it upon themselves to determine...[whether the warrant] was constitutionally entitled to enforcement...." Michigan v. DeFillippo at 443 U.S. 38. If they could, why require them to go to a magistrate in the first place?

The judiciary and law enforcement branches are distinct parts of the entire criminal justice system. The judiciary has regularly emphasized the importance of obtaining its approval before law enforcement officers are allowed to invade someone's privacy, even a criminal's.

Coolidge v. New Hampshire, supra; Johnson v. United States, supra; United States v. Ventresca, supra. Thus, by rigid application of the rule, the judiciary punishes both society and law enforcement while the criminal goes free. This is the antithesis of common sense.

The time has come to give law enforcement officers "breathing room" to operate in the harsh environment of the real world. It is also the time to restore integrity to the criminal judicial system by not applying the exclusionary rule to cases involving search warrants. See United States v. Hill, 500 F.2d 315, 322 (5th Cir. 1974), cert. denied, 420 U.S. 931 (1975). At the very miminum, society and the search for truth should not be punished because "the judge has blundered."

CONCLUSION

There is no doubt that the exclusionary rule has failed to withstand the test of time. As the rule is currently being applied across the country, it fails to deter police officers who are acting with a good faith belief that their conduct is lawful, and it also fosters disrespect for the judicial system by punishing society rather than the guilty defendant.

The rule should be modified to allow the admission of evidence in cases in which police officers acted with a reasonable, good faith belief that their conduct was lawful. However, evidence should never be excluded in cases in which a warrant has been properly executed by the police after having been properly issued by a neutral and detached magistrate. Amici respectfully request the Court to seize this opportunity to correct the injustice

that blind administration of the exclusionary rule has inflicted upon society.

Respectfully submitted,

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No. 81-430

In The

Supreme Court of the United States

October Term, 1982

STATE OF ILLINOIS,

Petitioner,

v.

LANCE AND SUSAN GATES,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER, STATE OF ILLINOIS

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER, STATE OF ILLINOIS

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by the Honorable Paul Biebel, on behalf of the Attorney General of the State of Illinois for petitioner and James W. Reilley, counsel for the respondents. A letter of consent signed by both parties has been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The Commonwealth of Virginia, through its Attorney General, respectfully offers this brief in support of the State of Illinois. The amicus will be affected by the decision because this case involves the Fourth Amendment to the United States Constitution which was made applicable to the states through the Due Process Clause of the Fourteenth Amendment in *Wolf* v. *Colorado*, 338 U.S. 25 (1949). This case particularly involves the application of the exclusionary

rule to evidence obtained in violation of the Fourth Amendment to the United States Constitution which was made applicable to the states in *Mapp* v. *Ohio*, 367 U.S. 643 (1961). The Commonwealth anticipates that a decision of this Court squarely approving the good faith exception to the exclusionary rule will materially assist the Commonwealth's efforts to promote law enforcement and serve justice for all of her citizens.

SUMMARY OF ARGUMENT

It is well-settled that the exclusionary rule is not, in and of itself, a requirement of the Constitution but a judge-made rule, the primary purpose of which is to deter unreasonable or bad faith police conduct. As presently applied, the rule fails to take into consideration the underlying nature of the Fourth Amendment violation and all violations are subject to the same harsh sanction, regardless of whether they result from flagrant police misconduct or inadvertent official mistake. Such indiscriminant application of the rule has the effect of preventing the emergence of the "whole truth" and of allowing guilty individuals to escape conviction and further endanger society. Therefore, the rule should not be applied in those cases where it does not effectively deter official misconduct.

Police officers who act in the good faith belief that their conduct is legal probably will not be deterred from acting in a similar manner under similar circumstances in the future. A police officer will not be deterred from engaging in illegal acts if he does not know that the acts are illegal or that his conduct is unlawful. Alternatively, it is possible that some police officers will be so deterred for fear of causing evidence to be suppressed and a case lost that they will not act at all to protect society's interest.

Virginia does not advocate the complete abrogation of the exclusionary rule. However, neither police officers nor society should be punished by the exclusion of evidence seized as a result of a judgmental error, when such an error was a good faith mistake or when the officer committed a technical violation.

The judiciary has accorded a preference to search warrants as an encouragement to police officers to obtain such warrants and it has upheld the presumption of the validity of an affidavit supporting a search warrant. In light of this preference, it should logically follow that prima facie evidence of an officer's reasonable good faith is established by the fact that he obtained a search warrant issued by a neutral and detached magistrate.

ARGUMENT

I

The Exclusionary Rule Should Not Operate To Exclude Evidence Seized By A Police Officer Who Acted Under A Reasonable Good Faith Belief That His Conduct Was Lawful.

Prior to its imposition on the states in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), this Court mandated the exclusionary rule apply only in the federal courts. The states were not required to follow the mandate and the rule, which evolved in the more pristine environment of federal prosecution, was not entirely responsive to the needs of local law enforcement. After *Mapp*, as the suppression doctrine became a fact of life in the state judicial arena during the 1960's, its deficiencies became increasingly apparent. Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J.Crim. L & Criminology, 635, 647 (1978).

In the next decade, dissatisfaction with the rule brought criticism and cries for reassessment. "Much of the doctrinal reassessment of the 1970's has been an attempt to alleviate the pressures on the criminal justice system created by coupling a liberal interpretation of the Fourth Amendment with an expansive application of the exclusionary rule." *Id.* at 647. To remedy the situation, many have urged the adoption of the good faith exception which has substantial historical and decisional support.

In fact, recent decisions of this Court reflect a trend moving steadily toward its adoption. For example, this Court refused to apply the exclusionary rule to grand jury proceedings in *United States* v. *Calandra,* 414 U.S. 338 (1974). The Court noted that the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Id.* at 348. The Court further stated that it declined "to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury." *Id.* at 351, 352. Although *Calandra* laid the foundation for subsequent curtailment of the exclusionary rule, this Court further developed the basic rationale supporting the good faith doctrine in subsequent cases.

In *Michigan* v. *Tucker,* 417 U.S. 433 (1974), this Court stated that prior to penalizing police error by judicial suppression of evidence, it would consider whether exclusion served a valid and useful purpose. *Id.* at 446. Keeping in mind the deterrent purpose of the exclusionary rule, the Court further stated that it hoped "to instill in. . . investigatory officers. . . a greater degree of care toward the rights

of the accused. Where official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Id.* at 447. *Tucker's* significance lies in the fact that it reflected the willingness on the part of a majority of the members of the Court to consider, under certain circumstances, the nature of the illegality in determining the applicability of the exclusionary rule. Ball, *supra.* at 652. While *Tucker* concerned a violation of the Fifth Amendment, the good faith rationale for exception to the exclusionary rule discussed in that case is equally applicable to the Fourth Amendment.

Following *Tucker,* this court in *Peltier* v. *United States,* 422 U.S. 531 (1975), examined the good faith doctrine in light of both the deterrence rationale and the imperative of judicial integrity. Although decisions of the Court applying the exclusionary rule refer to upholding the imperative of judicial integrity, as a purpose served by the rule, the Court recognized deterrence as the rule's primary purpose. *Id.* at 536. The Court reasoned that a police officer's good faith conduct would not offend the imperative of judicial integrity or the deterrence rationale even though subsequent decisions hold that their conduct was unconstitutional. *Id.* at 535-38. *Peltier* held that evidence obtained from a search should be suppressed only if the law enforcement officer "had knowledge or may be properly charged with knowledge that the search was unconstitutional under the Fourth Amendment." *Id.* at 542. Justice Powell in his concurring opinion in *Brown* v. *Illinois,* 422 U.S. 590 (1975) also contributed to the development of the good faith exception doctrine. He developed a sliding scale, placing flagrant abusive violations at one extreme and technical violations at the other. In his opinion, technical violations included arrests based on good faith reliance on a warrant

later invalidated and arrests pursuant to a statute subsequently declared unconstitutional. He opined that judicial integrity would demand that fruits of flagrant abusive violations be excluded. However, where technical violations were involved, neither judicial integrity nor deterrence justify the suppression of reliable and probative evidence. *Id.* at 611, 612.

Another significant case that touched upon the issue was *Stone* v. *Powell,* 428 U.S. 465 (1976). Although the issue of good faith was raised in *Stone,* the Court *did* not base its decision thereon. *Stone's* contribution to the good faith exception doctrine can be found in Justice White's dissent. Justice White not only examined technical violations but also recognized the good faith mistake as a second type of good faith violation. His definition of a good faith mistake involved officers making difficult judgments concerning the existence of probable cause based on available facts. *Id.* at 538-40. His good faith exception imposed two requirements on both technical violations and good faith mistakes: (1) A good faith belief that his conduct comported with existing case, and (2) reasonable grounds for that belief. *Id.* at 538. The imposition of these two requirements insures that no amount of good faith can withstand a challenge where the facts are so weak that no reasonable officer could ever view them as establishing probable cause. Justice White also concluded that where the officer acted as a reasonable officer would and should act, but where the Courts have ultimately determined that the officer was mistaken, the exclusion of evidence would have no deterrent effect because officers doing their duty will act the same way in similar future cases. *Id.* at 540.

One of the most recent developments in this Court's evolution of the exclusionary rules can be found in *United*

States v. *Havens* 1446 U.S. 620 (1980) where the Court refused to apply the rule to impeachment of a defendant's testimony at trial. *See also Jenkins* v. *Anderson* 447 U.S. 231 (1980) The premise of *Calandra* and its progeny is a realistic assessment of the underlying rationale for the exclusionary rule, and the conclusion in those cases is that at least a limited good faith exception to the rule will not erode society's interest in protecting the individual's Fourth Amendment right.

In recognition of the unwarranted inflexibility of the exclusionary rule, both state and some lower federal courts have adopted the good faith exception. The United States Court of Appeals for the Fifth Circuit, sitting *en banc*, adopted the good faith exception in *United States* v. *Williams*, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981). In *Williams*, the Fifth Circuit, squarely confronting the issue, held:

> [E]vidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized. We do so [hold] because the exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good faith ones. Where the reason for the rule ceases, its application must cease also. The costs to society for applying the rule beyond the purpose it exists to serve are simply too high. We are persuaded that both reason and authority support this conclusion.

United States v. *Williams*, at 840.

The *Williams* Court took pains to emphasize that the technical violation facet of the exception would apply *only* if the police belief is "bona fide and reasonable." Suppression would still result "if officers allege a good faith belief in a 'law so grossly and flagrantly unconstitutional that any

person of reasonable prudence would be bound to see its flaws' or in a law that violated a "controlling precedent that [it] was . . . unconstitutional.' " *Id.* at 843. Likewise, with respect to the good faith mistake facet of the exception, the *Williams* court required a reasonable as well as a good faith belief on the part of the law-enforcement official. *Id.* at 844.

In addition to the Fifth Circuit, the good faith exception to the exclusionary rule has been adopted by the State of Arizona in *State* v. *Mincey*, 636 P.2d 637; 650, although its applicability was confined to the particular facts of that case where the officer acted in good faith reliance on advice of a legal expert. Also, the Louisiana Supreme Court, following the holding in *Williams*, adopted the good faith exception and upheld a search warrant based on an affidavit from which material facts had been inadvertently but, in good faith, omitted. *State* v. *Lehnen*, 403 So.2d 683, 686 (La. 1981). In the case of *Gifford* v. *State*, 630 S.W.2d 387, 391 (Tex. Cr. App. 1982), the Court held that the exclusionary rule would not be applied when "police misconduct was merely technical." The Supreme Court of Virginia has said that it was persuaded by the logic of *Williams* in *Holloman* v. *Commonwealth*, 275 S.E.2d 620, 622 (Va. 1981), but could not apply the rule under the facts of that case.

Opponents of the good faith exception frequently contend that to adopt any exception would result in an erosion of the deterrent effect of the rule. However, as Chief Justice Burger noted in his dissent in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 419, 422 (1971), an administrative or quasi-judicial remedy affording restitution and compensation for persons whose Fourth Amendment rights are violated would be preferable to the "universal 'capital

punishment' we inflict on evidence when police error is shown in its acquisition." This alternative approach may well deter police more effectively than the automatic exclusion of evidence where the officer acts in good faith.

Modification of the exclusionary rule through the adoption of the good faith exception would serve to temper the harsh results that obtain when an officer makes a good faith mistake as to the existence of facts sufficient to constitute probable cause or when he commits a technical violation, laboring under the reasonable and good faith belief that his actions are lawful. Very often, the line between what is and what is not probable cause is obsfuscated. A recent example of the difficulty in determining what facts are sufficient to establish probable cause can be seen in *Robbins* v. *California*, 453 U.S. 420 (1981), where the judges of the California Court of Appeals reviewed a search and found it to be valid and five of the Justices of this Court found it to be invalid.

Why must society be punished for the good faith mistakes of a police officer when distinguished jurists reviewing that officer's action after the fact and in the tranquility of their libraries are unable to agree on the constitutionality of that officer's action? There is no need for society to be so penalized. The inflexible "capital punishment" mandated by the exclusionary rule represents a "punishment" which no longer fits the "crime," a remedy which no longer resolves, in an equitable fashion, the intractable problem of securing the blessings of liberty while establishing justice and promoting the general welfare.

If the police officer in *Robbins* is deterred in his future actions by the result in that case, it is likely that he will be deterred, not simply from acting unlawfully, but from acting at all. In a different context, this Court has recognized

that imposition of sanctions for good faith mistakes by public officials will deter even the most conscientious decision-maker from exercising his judgment independently, forcefully and in a manner best serving society. *Wood* v. *Strickland*, 420 U.S. 308, 319-320 (1975). In that case, this Court recognized that society is best served when government officials are free to exercise their discretion in good faith and in reliance upon traditional sources of information and in situations involving an obvious need for prompt action. *Id.* at 319. It is not without significance that the qualified immunity sanctioned in *Wood* and which insures such service to society is available even in cases brought to vindicate constitutional rights. Surely, if such is appropriate, as it is, in the civil context, it is time for this Court in the criminal context to create a flexible exclusionary rule, which will protect society while also protecting the rights of the individual.

The exclusionary rule is but one device for enforcing the Fourth Amendment, and it is far from being co-extensive with the Fourth Amendment itself. *United States* v. *Williams, supra,* at 847. Adoption of the concepts embodied in Justice Powell's concurring opinion in *Brown* v. *Illinois,* supra, and Justice White's dissent in *Stone* v. *Powell,* supra, would achieve the appropriate balance between individual rights and the interests of society.

II

The Fact That A Police Officer Obtains A Search Warrant From A Neutral And Detached Magistrate Should Be Prima Facie Evidence Of His Good Faith.

This Court in *United States* v. *Ventresca,* 380 U.S. 102 (1965), explicitly stated its concern with upholding the actions of law enforcement officers who consistently follow

the proper constitutional course. *Id.* at 109-12. The rationale underlying this decision is to encourage police officers to seek warrants. His decisions must be made in the heat of an investigation and if he does everything required and obtains a search warrant, he will not be deterred when evidence is excluded notwithstanding the fact that a neutral and detached magistrate authorized a search. Of course if the officer deliberately misrepresents the facts to the magistrate or acts in bad faith in securing the warrant the exclusionary rule should apply. The burden to establish this, however, should be upon the defendant who challenges the validity of the warrant. Moreover, unless patently unconstitutional, a police officer must be permitted, in good faith, to rely on legislative enactments even though the acts may be subsequently determined to be constitutionally deficient. As discussed above, to impose the exclusionary rule in such circumstances would serve no valid purpose. *Michigan* v. *DeFillippo,* 443 U.S. 31 (1979). *A fortiori,* a police officer, who in good faith obtains a warrant from a neutral and detached magistrate, should be able to rely upon that magistrate's determination of probable cause.

The Fifth Circuit in *United States* v. *Hill,* 500 F.2d 315 (5th Cir. 1974), *cert. denied,* 420 U.S. 931 (1975), admitted evidence obtained in a search although the warrant was technically deficient. The search warrant was issued upon an insufficient affidavit of the law enforcement agent. The Court in that case allowed the affidavit to be bolstered by the sworn testimony of the agent before the magistrate. The Court stated in that case:

> [T]his situation furnishes no occasion to apply the exclusionary rule to bar the evidence of Hill's criminality that was obtained in executing the warrant. Phillips acted properly in going to the magistrate and seeking

> a warrant. Magistrate Sear acted properly in calling for additional information to demonstrate the credibility. Thus, the only error attributable to the procedures they followed is a technical one that would in no way serve the deterrent purposes of the rule.

United States v. *Hill*, at 322.

The importance of seeking approval from a neutral and detached magistrate has been strongly emphasized in several decisions of this Court. *Cf. United States* v. *Lefkowitz*, 285 U.S. 452 (1932); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *Gerstein* v. *Pugh*, 420 U.S. 103 (1975).

The fact that a police officer has obtained a search warrant issued by a neutral and detached magistrate should be prima facie evidence of his good faith. Accordingly, evidence obtained pursuant to such a warrant, even though it may be defective, should not be excluded unless the opponent of the evidence can show the officer acted unreasonably or in bad faith.

CONCLUSION

At present, there is a general, inflexible application of the exclusionary rule without regard to the nature of any underlying violation. The effect has been the exclusion of reliable, probative evidence from the fact-finding process. When applied in cases involving good faith mistakes, the rule fails to keep faith with its original purposes of deterring police misconduct and upholding the integrity of the judicial system. Of course, in egregious circumstances, the rule serves a valid function and it should not be totally discarded. Its application should be modified, however, in order to avoid frustrating the ends of justice by requiring the exclusion of evidence obtained by police officers acting

under a reasonable, good faith belief that their conduct is lawful.

Respectfully submitted,

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No. 81-430

In the

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF ILLINOIS,

Petitioner,

vs.

LANCE GATES and SUSAN GATES,

Respondents.

On Writ of Certiorari to
The Supreme Court of Illinois

BRIEF OF THE ILLINOIS STATE BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

As defined by this court's order of November 29, 1982, the question on reargument is:

Whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, *Mapp* v. *Ohio*, 367 U.S. 643 (1962); *Weeks* v. *United States*, 232 U.S. 383 (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

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The Supreme Court of Illinois

BRIEF OF THE ILLINOIS STATE BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE ILLINOIS STATE BAR ASSOCIATION

The Illinois State Bar Association is a state-wide voluntary professional association of attorneys of the State of Illinois. Its membership consists of approximately 25,000 lawyers and judges and includes the majority of Illinois attorneys. The Association has traditionally taken an active role in public education on legal

issues and legal reform in the public interest. It maintains special section councils in areas of substantive law, including criminal justice.

The Association, through the section council on criminal justice, has frequently examined and debated the exclusionary rule. In December of 1981, the Board of Governors of the Association adopted a resolution supporting continuation of the present exclusionary rule and subsequently authorized filing of an *amicus curiae* brief in this case supporting continuation of the rule in its present form.

Counsel for both petitioner and respondent have consented to the appearance of the association as *amicus curiae*, and formal consent has been filed with the clerk of the Supreme Court.

SUMMARY OF ARGUMENT

The rule excluding evidence obtained in violation of the Fourth Amendment is applied in three very different situations:

1. where a police officer conducts a search and seizure with probable cause, but without a warrant, erroneously believing that the facts justify an exception to the warrant requirement;
2. where an officer conducts a search and seizure without probable cause and without a warrant, erroneously believing that probable cause exists;
3. where an officer conducts a search and seizure under authority of a warrant, and the magistrate has issued the warrant upon evidence which does not rise to the level of probable cause.

The present case presents the last of these three situations only. Although petitioner and supporting *amici* have urged the creation of a "good faith" exception to the exclusionary rule, asking that the rule not apply to cases in which the police officer is acting in the good faith belief that his conduct comports with the Fourth Amendment, the subjective good faith of the officer (absent a deliberately perjured warrant affidavit) is irrelevant when the search is conducted upon a warrant.

The question in a warrant case is not whether the officer acted in good faith, for the officer is entitled to rely upon the decision of the magistrate to issue or deny the warrant. Once the warrant has issued the officer's subjective belief is no longer material.

The question rather is whether or not there is to be a remedy for violation of the Fourth Amendment. If the exclusionary rule is abandoned, or even modified according to the proposals of petitioner and supporting *amici*, then there is no realistic remedy and the right guaranteed by the amendment must, in time, sink to a pious approbation rather than a rule of law.

The proposed modifications, though purportedly directed only to the remedy of exclusion, in fact are so designed as to dilute the substantive guarantee of probable cause itself.

There is, to be sure, a social cost which the exclusionary rule makes vivid. But this is not the cost of the rule. It is the cost of maintaining the underlying constitutional principle that there shall be no search without probable cause. Petitioner's true quarrel lies with the Fourth Amendment, and not with the exclusionary rule.

Alternatives to the exclusionary rule have been proposed from time to time, but all have suffered from such serious shortcomings as to be unrealistic replacements. Either they are theoretical remedies of no practical utility, or they unfairly punish the police officer for a good faith mistake.

It is, unfortunately, the frequent good faith mistake rather than the occasional deliberate violation which holds the greater danger to the Fourth Amendment. The exclusionary rule is an effective and reasonable remedy for such errors.

ARGUMENT

I

THIS CASE PRESENTS A SEARCH PURSUANT TO A WARRANT AND ANY DISCUSSION OF THE EXCLUSIONARY RULE SHOULD BE LIMITED TO ITS APPPLICATION TO SUCH CASES. THE APPLICATION OF THE EXCLUSIONARY RULE TO CASES INVOLVING WARRANTLESS SEARCHES PRESENTS DIFFERENT QUESTIONS, AND IT NEED NOT AND SHOULD NOT BE ADDRESSED IN THE CONTEXT OF THE PRESENT CASE.

This court should continue to follow its long-established tradition of avoiding unnecessarily broad rulings. Modification of the exclusionary rule should be reviewed only to the extent of the facts actually presented by this case: a search and seizure conducted pursuant to a warrant issued without probable cause.

Unlawful searches and seizures fall into two grand divisions, those made without a warrant and those made upon an improperly issued warrant. The warrantless search cases themselves, leaving aside the intentional or reckless violation of a Fourth Amendment right, are of two main types:

1) Those where probable cause does in fact exist, and the violation consists of failure to obtain a warrant. In these cases the police would be entitled to a warrant if they were to apply for one, but choose to conduct a warrantless search instead under the mistaken impression that an exception to the warrant requirement applies;

2) Those where there is in fact no probable cause. In these cases the police would have been denied a warrant had they made application, and the warrantless search is undertaken in the erroneous belief that both probable cause and a warrant exception exist.

Neither of these situations is presented on the present record. Instead we have a case in which the police applied for a warrant and obtained one, and conducted the search and seizure upon authority of that warrant. Subsequent review on motion to suppress established that the warrant had issued without probable cause.

The only question fairly presented on this record, so far as the continuation of the exclusionary rule is concerned, is whether that rule should be continued or modified as a remedy for search and seizure on an improperly issued warrant. More specifically, the issue goes not to any technical defect in the warrant language but rather to the very essence of the Fourth Amendment protection, the court authorization of a search without the constitutionally mandated standard of probable cause.

This court should confine its review of the exclusionary rule to these facts and to this question:

> Whether the exclusionary rule should to any extent be modified so as, for example, not to require the exclusion of evidence obtained pursuant to a warrant where the facts adduced before the magistrate to support issuance of that warrant fail to establish probable cause.

Petitioner's Brief on Reargument confines itself to this issue. Briefs of other *amici curiae* filed in support of petitioner, however, urge a broader review and ask this court to go beyond the issue of the case to re-

view and either modify or abandon the exclusionary rule in all cases, warrant and warrantless alike. *Amicus curiae* briefs filed by the State of Florida, the State of Virginia, the National District Attorney's Association, and the United States, among others, invite the court to address the future of the rule in all its applications.

This invitation should be rejected and review of the exclusionary rule should be limited to warrant searches where the defect is absence of probable cause.

Cases such as the present are essentially different from warrantless search cases. The subjective belief, or good faith, of the searching officer, which might be a relevant consideration in a warrantless search case, has no bearing on a search conducted pursuant to a warrant. The issue here is not the application of the exclusionary rule to respond to mistake or misconduct of the police, but rather whether the rule is a constitutionally mandated, or otherwise appropriate, remedy for the judicial error of issuing a search warrant where, by constitutional requirement, no warrant should have issued.

Hearings and inquiries into the beliefs and judgments of the officers have no place in the present case. We may properly conclude that the police, in assembling such evidence as they had and submitting it to a magistrate for review, were doing what they were supposed to do and that they were entitled to rely upon the determination of the magistrate.

The case of a search on a warrant arises after a court, in an *ex parte* hearing, rules on the constitutional rights of a person who has no notice, no counsel, and no opportunity to appear and assert his position and interest. He is unable to assert his rights until after the war-

rant has been executed. The question in this case is whether a person so situated may be deprived of his only effective remedy for a judicial error affecting a basic constitutional right.

No other application of the exclusionary rule is presented on the facts of this case. Any considered modifications in the rule as it applies to warrantless searches, with or without probable cause, should not be addressed now, but should be left for consideration on the day when such a case comes before the Supreme Court.

II

WHERE A SEARCH IS UNDERTAKEN PURSUANT TO A WARRANT THE GOOD FAITH OF THE POLICE OFFICER IS IRRELEVANT AND THE EXISTENCE OF A "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE HAS NO APPLICATION.

The subjective good faith or bad faith of a police officer is irrelevant where a search and seizure is conducted pursuant to a warrant. Although a perjured affidavit may render invalid a warrant which bears no defect on its face, *Franks* v. *Delaware*, 438 U.S. 154 (1978), the opinion of the officer as to whether the magistrate was right or wrong in issuing the warrant has no other bearing on the application of the exclusionary rule.

The "good faith exception" to the exclusionary rule is a concept whose application, if any, is logically confined exclusively to the realm of warrantless searches. It may be debated whether exclusion is required or appropriate where the officer, acting upon probable cause, makes a warrantless search in the good faith mistaken

belief that no warrant is required. Likewise it may be argued whether the exclusionary rule should apply where the officer in good faith believes that he has probable cause when in fact he does not, and conducts a warrantless search on that basis. In either case the officer's good faith might arguably have some bearing on the invocation of the exclusionary rule.

But where a warrant has been sought and actually has issued the officer's opinion as to the reasonableness of the search or of the warrant is of no importance. There is no reason, in law, logic or policy to countenance a rule which places on the police officer the obligation or duty to second guess the magistrate or to sit in his squad car as a court of review over Fourth Amendment determinations.

Nevertheless, a number of *amicus curiae* briefs filed in support of the petitioner reflect confusion as to the place of the "good faith" concept in warrant cases.

For example, *amicus curiae* the State of Virginia sets out this two-point proposition:

> "1. The exclusionary rule should not operate to exclude evidence seized by a police officer who acted under a reasonable good faith belief that his conduct was lawful;
>
> 2. The fact that a police officer obtains a search warrant from a neutral and detached magistrate should be prima facie evidence of his good faith."
>
> Brief of *amicus curiae* the State of Virginia, p. i

Amicus curiae the National District Attorneys' Association, Inc. reflects similar confusion when it states:

> "We ask this Court to adopt a good faith exception to the Rule not only in cases where a search warrant

> has been issued by an impartial magistrate, as in the instant case, but in *all* [emphasis in original] appropriate cases where the police have acted in the objective good faith belief that their conduct conformed to the requirements of the Fourth Amendment."
>
> Brief of *amicus curiae* the National District Attorneys' Association, Inc., p. 3

The State of California, in its brief as *amicus curiae*, summarizes its argument in this language:

> "The constitution does not require suppression of evidence seized by police acting in good faith reliance upon a warrant issued by a judge in the reasonable, if mistaken, belief that the supporting affidavit supplied probable cause."
>
> Brief of *amicus curiae* the State of California, p. i

Similar constructions of the issue can be found in the briefs of other *amici* and confusion as to the role of the police officer's subjective opinion exists in the brief of the petitioner, Brief of Petitioner the State of Illinois, pp. 11-16. It is not surprising that the principal authorities cited by petitioner in support of the good faith exception, *United States* v. *Williams*, 622 F.2d 830 (5th Cir., 1980, *en banc*) and *People* v. *Adams*, 53 N.Y. 2d 1, 422 N.E.2d 537 (1981), both involved warrantless searches.

The true issue in the present case has nothing to do with good faith or reasonable mistakes on the part of the police. It is instead whether, regardless of the subjective beliefs of the police officer, evidence seized pursuant to a warrant issuing on inadequate facts is to be immune from exclusion.

If the warrant is valid it is of no consequence that the officer believes the judge wrong. And if the

warrant is invalid it is of no matter that the officer assumes, as he naturally would, that the judge was correct. The officer's duty is to assemble such evidence as is available in support of the proposed search, reduce it to the form of an affidavit, and submit it to a magistrate for decision as to whether or not the constitutional standard has been met. Once the affidavit has been submitted the officer's Fourth Amendment duty has been fulfilled, and the officer has no choice but to accept the magistrate's decision and search or not search as the decision may be. Indeed, the DuPage County, Illinois, warrant in the present case (Supp. Record filed June 28, 1982) did not merely authorize, but affirmatively and positively commanded that the search be made.

Once the warrant has issued the inquiry must go not to the beliefs of the officer but rather to the correctness or error of the magistrate. If probable cause has been shown then the Fourth Amendment rights of the subject of the search have been protected. If, on the other hand, the magistrate has signed a warrant without probable cause then the subject has suffered an infringement of those rights for which a remedy must be available. It is a most peculiar notion that vindication of those rights should be barred because the officer on his way to execute the warrant is unaware that the warrant is defective. The error and the infringement has been made by the court, and it makes no sense to create a level of artificial insulation between the court and its error by creating a rule that if the ministerial officer who serves and executes a bad warrant upon order of court believes it valid, then the remedy which would otherwise follow is to be denied.

The continued general application of the exclusionary rule as the remedy for illegal searches and seizures based upon judicial warrants depends upon whether the rule is a necessary and constitutionally mandated corollary to the Fourth Amendment and on whether, if not, it is nevertheless the most practical and reasonable remedy for violation of Fourth Amendment rights. The application in any individual case cannot, and should not, depend upon the subjective opinions of the police officer who obtains or executes the warrant as to whether the warrant is valid or reasonable.

Amicus does not support the application of a "good faith" exception to warrantless searches. But if any place for that exception might exist it would be in the realm of the warrantless search. No such search is presented on this case. Where the search is based upon a warrant, no "good faith" exception makes any logical sense.

III.

EXCLUSION OF UNLAWFULLY SEIZED EVIDENCE REMAINS THE BEST AND MOST APPROPRIATE REMEDY WHERE THE SEIZURE TAKES PLACE PURSUANT TO A WARRANT ERRONEOUSLY ISSUED UPON SOMETHING LESS THAN THE CONSTITUTIONALLY MANDATED STANDARD OF PROBABLE CAUSE.

A.

Failure to Continue the Remedy of Exclusion Must Inevitably Cause the Decay of the Substantive Probable Cause Standard.

There is not the slightest doubt that the probable cause standard for searches and seizures is the explicit mandate of the Constitution. The Fourth Amendment plainly states that ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . ."

U.S. Constitution, Amdt. IV. Whether the exclusionary rule is similarly mandated is less clear. Early cases, including the seminal *Weeks* v. *United States,* 232 U.S. 383 (1914) view exclusion of illegally seized evidence as flowing inevitably from the Fourth Amendment, while such later cases as *United States* v. *Calandra,* 414 U.S. 338 (1974) and *Stone* v. *Powell,* 428 U.S. 465 (1976) have construed the rule as a judicial remedy not necessarily required by the Constitution.

However that may be, it cannot be denied that probable cause as the basis of every warrant is no mere judicial construction but is as clear a command as any to be found in the entire Constitution. And the Fourth Amendment requirement that searches and seizures shall not be "unreasonable" has been consistently held to mean that the same standard of probable cause must be met whether the search and seizure is conducted with a warrant or without; compare, i.e. *Carroll* v. *United States,* 267 U.S. 132 (1925) ("reasonable grounds") with *Husty* v. *United States,* 282 U.S. 694 (1931) ("probable cause") and *Brinegar* v. *United States,* 338 U.S. 160 (1949).

Now, however, petitioner and supporting *amici* propose that this court adopt modifications of the exclusionary rule as it applies to warrant searches which must have the inevitable effect of diluting the probable cause standard to the point where it becomes meaningless.

Petitioner, for instance, argues that evidence seized without probable cause from Respondents should be admitted because "even if [the magistrate] made a mistake in his determination of probable cause there was a reasonable basis for concluding that probable cause

existed," Brief of Petitioner, p. 4. And, making the point still more explicitly, Petitioner urges,

> "It may be, in such instances, that the police officer made a mistake, at least in the mind of the judge who is reviewing his conduct. But, so long as the officer's or magistrate's error was a reasonable one, the exclusionary rule should not be applied." Petitioner's brief, p. 13.

Amicus curiae the State of California proposes the following rule:

> "A search warrant issued by a judicial officer may not be attacked on the basis of inadequate affidavit support unless procured by material misrepresentation or unless so lacking in the indicia of probable cause as to render reliance upon it wholly unreasonable."
> Brief of *Amicus curiae* the State of California, pp. 5-6

These are typical of the proposals of those who object to the rule in its present form, and indeed, if the rule is to be modified it is hard to conceive of a modification that would not operate basically along the lines sought by Petitioner and by the State of California. The practical operation of such revisions deserves the closest examination and scrutiny.

The flaw of the proposed revisions is that they afford no remedy and no restriction where the information underlying a warrant vaguely approaches probable cause, but does not establish it. If the magistrate knows his law of probable cause, and evaluates the warrant affidavit carefully in the invariably *ex parte* warrant hearing, then the constitutional standard will be met. If, on

the other hand, the magistrate evaluates the affidavit incorrectly and finds a showing of probable cause where none exists it would then be open to the prosecution, on motion to suppress, to show that something in the general neighborhood of probable cause was demonstrated, and no remedy would lie. The trial court could not suppress the evidence and there would be nothing to review in the event of an appeal. Ultimately a slightly lower practical standard for warrant affidavits would come into being than that called for by the decisions of the Supreme Court defining probable cause. The Constitution would come to allow "reasonably unreasonable searches and seizures," and the maxim that "close only counts with horseshoes and hand grenades" would expand to include the Fourth Amendment as well.

With a lesser standard established, it would inevitably happen that affidavits would be presented falling still farther from true probable cause, yet not far from the semi-probable cause which would evolve through custom and usage. It would still be open to the prosecutor to show that these errors, too, were reasonable mistakes for which suppression should not lie.

This pattern of deterioration would be able to continue, under the rule proposed, until an affidavit based either upon flat perjury or upon patently unsatisfactory evidence would finally invoke the exclusionary rule. Under the proposed revision, an affidavit qualifying for invocation of the exclusionary rule would eventually have to fall to this level:

> "I, A.B., a police officer, state on oath that one week ago this date I met with a person whose name is unknown to me, but whom I know to be a narcotics addict, that this person promised to give me valuable

> information in exchange for money to buy narcotics, and that upon my supplying him with two hundred dollars he stated that if I would go to the third floor apartment at 233 G. Street I would find something of great interest to the police."

This is not intended to be a misreading or an exaggeration of petitioner's position. We remind the court once more of the serious proposal in the brief of the State of California that, in the absence of material misrepresentation, the exclusionary rule be applied only to an affidavit "so lacking in the indicia of probable cause as to render reliance upon it wholly unreasonable."

It is simply not possible to maintain probable cause as a substantive standard if the procedural changes suggested by petitioner and supporting *amici* are adopted.*

Abandonment or restriction of the present exclusionary rule as it applies to warrant searches is a dangerous proposal which threatens the ability of the courts to maintain the substantive standard of probable cause which the Fourth Amendment unquestionably demands.

It is urged by some opponents, however, that the exclusionary rule has for its sole purpose the deterrence of misconduct by the police, and that it has no place as a remedy for judicial error; see, i.e. Brief of Petitioner, pp. 5-7, Supplemental Brief of the United States as *amicus curiae,* Brief of the State of Florida, et al., as *amici curiae,* p. 7. This view is based upon a misunderstanding of this court's language in cases such as *United States* v. *Calandra,* 414 U.S. 338 (1974), and *Stone* v.

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* Unless, of course, an equally adequate remedy is available. As discussed below in part III. C. of this brief no such substitute exists.

Powell, 428 U.S. 465 (1976), in which the court declined to extend the application of the exclusionary rule to situations bearing only an attenuated relationship to the original search. Although referring specifically to the effect of the rule as a deterrent to misconduct by the police, the true thrust of these cases is that the theoretical underpinnings of the exclusionary rule must yield before the general principle of admitting all relevant evidence in an effort to determine truth where the exclusion of that evidence is not also supported by an immediate practical benefit.

We need not disagree with cases holding that exclusion is not applicable to proceedings before a grand jury, *Calandra,* or to collateral review, *Stone,* or to a civil action, *United States* v. *Janis,* 428 U.S. 433 (1976), to conclude that the results in those cases are not good guidance for criminal cases in which the government seeks to admit unlawfully seized evidence into the very prosecution for which the seizure was undertaken.

It may be true that in the *Calandra, Stone* and *Janis* situations the benefits of exclusion are so slight and so attenuated that the rule's effect on the evidence becomes the more important consideration.

As a hard, practical matter, however, this is not so where the fruits of an unlawful search are offered in the initial criminal prosecution. It is in that context that the warrant is actually sought and that the existence or non-existence of probable cause must be determined. To admit or refuse evidence in other types of proceedings will have little effect on the fate of the probable cause standard. But to allow the results of Fourth Amendment violations into the initial criminal

prosecution will have an immediate and deleterious effect on the very concept of probable cause and on the ability of the courts to enforce the protection which the Fourth Amendment creates for every person in this country.

B.

The Cost of Enforcing the Fourth Amendment Is To Be Found Not in the Exclusionary Rule, But Rather in the Underlying Substantive Standard of Probable Cause.

Opponents of the exclusionary rule point to the social cost of not using presumably reliable evidence only because it has been improperly obtained. There is, to be sure, an unascertainable cost in making such evidence unavailable. It is not the exclusionary rule, however, which imposes that cost. It is the requirement that a search not take place in the absence of probable cause. Those who deplore the cost have a quarrel not with the procedural rule of exclusion, but with the substantive rule of the Fourth Amendment. Their remedy is not to overrule *Weeks* or *Mapp* but to remove the requirement of probable cause from the Constitution.

Accusations against the exclusionary rule based upon its supposed cost are revealed as fallacious in an excerpt taken from a recent and highly respected treatise, La Fave on *Search and Seizure,* from which we quote at length:

> "The nature of the exclusionary rule is such that it makes the cost of honoring the Fourth Amendment apparent. As Professor Kaplan has observed, 'by definition it operates only after incriminating evidence has already been obtained' and thus 'flaunts before us the cost we must pay for the fourth amendment guarantees.' But it is not correct that the

> cost is attributable to the exclusionary rule. Those who drafted the Fourth Amendment may not have specifically contemplated the exclusionary sanction, but surely they expected the commands of the Amendment to be adhered to. 'To the extent that the police obey the constitutional commands, the community foregoes such advantages as it might enjoy from evidence that can only be obtained illegally.' It may fairly be said, then, as Justice Traynor once observed, that the cost argument was rejected when the Fourth Amendment was adopted."
>
> La Fave, *Search and Seizure*, Vol. 1, p. 23, West Publishing Co., St. Paul, 1978.

C.

No Adequate Remedy Other Than the Exclusionary Rule Has Been Suggested.

The exclusionary rule for search and seizure cases has been the law in the federal courts since 1914, *Weeks* v. *United States*, 232 U.S. 383 (1914), but it did not become binding upon the states until forty-eight years later, *Mapp* v. *Ohio*, 367 U.S. 643 (1962). Throughout the intervening period the states were free to devise any other means they might choose to enforce constitutional privacy protections. Indeed, between 1949 and 1962 it was the explicit rule established by this court that although the Fourth Amendment was made applicable to the states through the Fourteenth Amendment, the exclusionary rule was not, *Wolf* v. *Colorado*, 338 U.S. 25 (1949).

The absence of response to *Weeks* and *Wolf* suggests that there is no satisfactory substitute and that the exclusionary rule, whatever its shortcomings may be, remains preferable to any alternative.

The exclusionary rule has the merit of providing a remedy to any unlawful search and seizure, not merely to one which is intentional or extreme. If probable cause is to have any meaning it must be protected from well intentioned misapplication as well as from deliberate flouting. A substitute rule which would provide, as most suggested substitutes have, for some form of damages or discipline against the searching officer is both cruelly inappropriate and socially dangerous when applied in the case of accidental error. It is objected that the exclusionary rule does not deserve to be applied to a good faith error. Yet it is far more unfair to impose damages or punishment upon the individual officer guilty of a well-motivated mistake.

The most dangerous feature of a rule imposing sanctions is that it will intimidate the police from performance of their duties. Under the present rule, the officer is not afraid to act in a doubtful case, knowing that if he errs the remedy will be directed where it belongs; against the improperly obtained evidence, and not against him. Under virtually every other proposal the remedy is directed against the officer, with the result that either no remedy at all will be provided for an honestly meant violation of a basic right, or else that because a remedy is available the police will before long be reluctant to leave their squad cars.

The exclusionary rule remains superior to any alternative, and the decision of almost every state to stay with the rule when it was not required remains persuasive evidence of this superiority.

IV.

THE STATE OF ILLINOIS HAS, FOR SIXTY YEARS, MAINTAINED AN EXCLUSIONARY RULE IN SEARCH AND SEIZURE CASES AS A MATTER OF STATE LAW. BECAUSE AN INDEPENDENT STATE BASIS EXISTS FOR THE DECISION OF THE ILLINOIS SUPREME COURT THAT DECISION SHOULD NOT BE REVIEWED AND THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED OR, ALTERNATIVELY, THE CASE SHOULD BE REMANDED TO THE ILLINOIS SUPREME COURT FOR DETERMINATION WHETHER IT WAS DECIDED ON THE BASIS OF FEDERAL OR STATE LAW.

The State of Illinois, as a matter of state constitutional law, Illinois Const. (1870) Art. II § 6, Illinois Const. (1970) Art. I § 6, has maintained an exclusionary rule in search and seizure cases, independent of any federal rule, since 1913, *People* v. *Brocamp,* 307 Ill. 448 (1923). It was established long before *Mapp* v. *Ohio,* 367 U.S. 643 (1962) applied the Fourth Amendment to the states, and Illinois consistently maintained it even between 1949 and 1962 when *Wolf* v. *Colorado,* 338 U.S. 25 (1949) was the controlling law and no state was under federal obligation to have such a rule.

If any modification of the exclusionary rule is to be considered, that consideration should be given either in a case arising out of the federal courts or, if from a state court, only when:

1) the state has enacted a proposed alternative to the exclusionary rule and asks to be relieved of the *Mapp* rule in light of that alternative; or

2) where the decision of the state court makes it clear that it applies the exclusionary rule only because federal constitutional decisions require it to do so, or

3) where state law explicitly adopts the federal construction of the law of search and seizure.*

A case from Illinois is not an appropriate vehicle for reconsideration of a doctrine which also exists independently under Illinois law.

For this reason the writ of certiorari should be dismissed as improvidently granted in light of an independent state basis for the decision.

Alternatively, if there be any question as to whether the Illinois Supreme Court decided this case under Illinois law or under federal constitutional law, the appropriate remedy is to remand the cause to the Illinois Supreme Court for resolution of that question.

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* As, for instance, the Constitution of the State of Florida (1968) Art. I, sec. 12, which provides that the prohibition against unreasonable search and seizure "shall be construed in conformity with the 4th Amendment to the United States Constitution as interpreted by the United States Supreme Court." Brief of *amicus curiae* State of Florida, p. 1.

CONCLUSION

The State of Illinois has long maintained an exclusionary rule for violations of the search and seizure provisions of its own state constitution. It is appropriate, therefore, to dismiss the writ of certiorari as improvidently granted in light of an independent state basis for the decision below. Alternatively, the question whether the result below was premised on Illinois law or on the Fourth Amendment should be certified to the Illinois Supreme Court.

The application of the exclusionary rule to warrantless searches is not presented on the facts of this case, and any modification of the rule should be confined strictly to cases of search and seizure based upon a warrant.

Both constitutional law and policy, however, require that the exclusionary rule be retained in its present form. If this court reaches the question on which it has requested reargument it should reaffirm the exclusionary rule

as it now exists, and should affirm the judgment of the Illinois Supreme Court.

Respectfully submitted,

THE ILLINOIS STATE BAR ASSOCIATION
as *Amicus Curiae*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ILLINOIS,
Petitioner

v.

LANCE and SUSAN GATES,
Respondents

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF AMICUS CURIAE OF THE LEGAL INTERNSHIP PROGRAM, GEORGETOWN UNIVERSITY LAW CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

The Legal Internship Program is a graduate degree program in Trial Advocacy. Each year, four E. Barrett Prettyman Fellows and one Stuart Stiller Fellow represent indigent criminal defendants in the Superior Court and Court of Appeals of the District of Columbia, and the United States District Court and Circuit Court of Appeals. Since the program's inception in 1960, Georgetown graduate fellows have represented more than two thousand indigent clients in the District of Columbia courts. Fellows also supervise third year law students from Georgetown University Law Center who undertake to represent indigents charged with misdemeanor offenses in the Superior Court. The third component of the fellowship--alongside teaching and practice--is scholarship. Fellows must

complete a thesis of publishable quality in order to earn an LL.M. degree. Published works include: Law and Tactics in Exclusionary Hearings (1969), Law and Tactics in Federal Criminal Cases (1964), The Preliminary Hearing (1967), Law and Tactics in Sentencing (1970).

The interest of the Legal Internship Program in the question now before the Court is both practical and scholarly: how would the proposed modification of the exclusionary rule influence the protection of Fourth Amendment rights in contacts between police officers and private citizens and in the practice of a trial court, and how well would such a modification fit this Court's consistent exposition of the Fourth Amendment warrant clause? After consideration of both aspects of this question, the Legal Internship Program of Georgetown

University Law Center, as amicus curiae, urges this Court to answer the question posed on reargument in the negative.

SUMMARY OF ARGUMENT

The Court has asked the parties to address the question "whether the rule requiring exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment...should to any extent be modified, so as, for example, not to require exclusion of evidence obtained in the reasonable belief that the search and seizure was consistent with the Fourth Amendment." ___ U.S. ____. An affirmative answer to this question would require this Court to overturn more than a half century of precedent reversing convictions obtained using evidence seized pursuant to a warrant issued

without probable cause. Even if this Court were to vanquish each of these decisions in turn, the language of the Constitution would remain an unconquerable obstacle: "No warrant shall issue, but upon probable cause."

It may be helpful to place the issue in perspective from the outset. The exclusionary rule has drawn considerable lightning in both scholarly and judicial circles in recent years,[1] but most of the

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1 E.g., Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. Crim. L. & Criminology 635 (1978); Carrington, Good Faith Mistakes and the Exclusionary Rule, 1 Crim. Just. Ethics 35 (1982); Schroeder, Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule, 69 Geo. L.J. 1361 (1980); Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027 (1974) (scholarly works); United States v. Ross, 655 F.2d 1159, 1204, (D.C. Cir. 1981), (Wilkey, J., dissenting) rev'd ____ U.S. ____, Dkt. No. 80-2209 (June 1, 1982); Bivens v. Six Unknown Agents,
(Footnote continued)

attention has focused on the reasonableness of police activities. The case before the court, however, poses a fundamentally different problem. The police officers obtained and conducted a search in reliance on a warrant. Certainly, if a magistrate issues a warrant, a police officer cannot be expected independently to question the existence of probable cause. A search pursuant to a warrant will always be, from the perspective of the officers who execute it, "reasonable." The real question is whether this Court will

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[1](continued)
403 U.S. 388, 416-418 (1970) (Burger, C.J., dissenting). But see Mertens and Wasserstrom, Foreword: The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L.J. 365 (1981); Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349 (1974).

abandon its historical commitment to the warrant clause, by endorsing warrants issued, not upon probable cause, but upon a "reasonable facsimile."

For all of the permutations of circumstance it must measure, probable cause is an objective standard applied to the information submitted under oath to the issuing magistrate. Review of the sufficiency of this showing of probable cause is both deferential to the magistrate's decision, United States v. Ventresca, 380 U.S. 102 (1965), and confined to the record before him or her. Petitioner urges this Court to forego this clear-cut inquiry in favor of one which would weigh the reasonableness of an admittedly mistaken finding of probable cause. The effect would be to render an erroneous finding of probable cause irrevocable and irremediable. If framed

instead as a matter of the magistrate's subjective "good faith," the proposed modification of the exclusionary rule would merely restate the requirement that a magistrate be "neutral and detached," without enforcing the probable cause requirement. Neither of these alternatives are consistent with the plain language of the Fourth Amendment.

Aside from the terms of the Fourth Amendment itself, the proposed modification of the exclusionary rule is ill-conceived. Its proponents misapply this Court's calculation of the costs and benefits of the exclusionary rule, and grossly understate the deterrent effect of the rule and the value of the Fourth Amendment to the preservation of a free society. A rule which permits the introduction of illegally seized evidence in the government's case at trial would undo

all that Mapp and Weeks have done to instill Fourth Amendment principles in law enforcement agencies. Such a modification would invite lawlessness and ignorance, and would arrest the development of Fourth Amendment law.

The historical tradition which engendered the Fourth Amendment, the language of the Constitution itself, and this Court's precedents, firmly rooted in the Constitution, compel this Court to answer the question posed on reargument in the negative.

ARGUMENT

I

THE CONSTITUTION REQUIRES PROBABLE CAUSE, NOT A "REASONABLE FACSIMILE."

The Framers of the Fourth Amendment included a probable cause requirement for a simple reason: they wanted to make it more difficult for government officials

to invade the privacy of citizens and to seize their possessions.[2] While this

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2 What Justice Frankfurter wrote, dissenting, in Davis v. United States, 328 U.S. 582, 614-15 (1946) remains apt today:

> It is too often felt, though not always avowed, that what is called the nice observance of these constitutional safeguards makes apprehension and conviction of violators too difficult.
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> * * *
>
> The Court in this case gives a new label to an old practice and to an old claim by police officials. But it happens that the old practice and the old claim now refurbished in a new verbal dress were the very practice and claim which infringed liberty as conceived by those who framed the Constitution and against which they erected the barrier of the Fourth Amendment. I am constrained to believe that today's decision flows from a view of the Fourth Amendment that is unmindful of the history

(Footnote continued)

requirement doubtless impedes the gathering of evidence of crime and the apprehension of malefactors, it is basic to our social and political system.[3]

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[2] (continued)

> that begot it and of the purpose for which it was included in the Bill of Rights...Stern enforcements of the universal law is the hallmark of a healthy and self-confident society. But in our democracy such enforcement presupposes a moral atmosphere and a reliance upon intelligence whereby the effective administration of justice can be achieved with due regard for those civilized standards in the use of the criminal laws which are formulated in our Bill of Rights.

[3] It is the probable cause requirement of the Fourth Amendment, not the exclusionary rule, which protects the concealment of contraband or evidence in a private place, unless a valid warrant authorizes an intrusion. Exclusion of evidence seized in violation of the probable cause requirement does nothing more than place the parties where they stood before the Fourth Amendment

(Footnote continued)

This Court's previous decisions reflect little tolerance for warrants issued upon facially inadequate affidavits. Since Byars v. United States, 273 U.S. 28 (1927), this Court's analysis has been straightforward and consistent. A

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[3](continued)
was violated.

In the Senate Judiciary Committee hearings on proposed modifications of the exclusionary rule, Yale Kamisar, Professor of Law at the University of Michigan, testified:

> It is not that [the criminal] is going free because the constable has blundered. It is because he would have gone free if the constable had complied with the law. It seems to me that if you put it that way, it comes out differently.

Exclusionary Rule Bills: Hearings before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary on S.101, S.751 and S.1995, 97th Cong. 1st and 2d Sess. 366 (1982) [Hereinafter cited as Exclusionary Rule Hearings].

warrant must rest upon a solid foundation of probable cause; otherwise it is simply a piece of paper. In Byars the Court rejected a warrant which issued upon an affirmation that the affiant "has good reason to believe and does believe that the defendant has in his possession" intoxicating liquor. Id. at 29. Justice Sutherland wrote:

> A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our constitutional system, that evidence of crime discovered by a federal officer in making a search without a lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed.

Id. at 29-30 (citations omitted)

Likewise, in United States v. Berkeness, 275 U.S. 149 (1927) the Court directed the dismissal of a nuisance complaint

filed under the Alaska Prohibition Act for lack of admissible evidence. The warrant affidavit in that case failed to allege that liquor was kept in the defendant's house for sale, rather than for personal consumption. Go-Bart v. United States, 282 U.S. 344 (1931) concluded with a remand to the district court with instructions to enjoin the use against the defendant of evidence seized under color of a defective warrant. Because the affidavit was verified upon "information and belief" rather than the arfiant's personal knowledge, and failed to relate facts sufficient to constitute an offense, the warrant was "improvidently issued and invalid on its face." Id., 282 U.S. at 356.

In a fourth Prohibition era case, Grau v. United States, 287 U.S. 124 (1932) this Court struck down yet another

warrant because the affidavit failed to allege a sale of liquor. In Nathanson v. United States, 290 U.S. 41 (1933) Justice McReynolds announced the decision of a unanimous court. He framed the issue as follows:

> All unreasonable searches and seizures are absolutely forbidden by the Fourth Amendment. In some circumstances a public officer may make a lawful seizure without a warrant; in others he may act only under permission of one. In the present case the place of search and seizure was a private dwelling. The challenged warrant is said to constitute authority therefor. Did it issue upon probable cause supported by oath or affirmation within the intendment of the Amendment?
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> * * *
>
> Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough.

Id., 290 U.S. at 46-47. Likewise, in Giordenello v. United States, 357 U.S. 480 (1958) Justice Harlan authored a decision in which the Court reversed Giordenello's conviction for possession of heroin. The error below involved the introduction of evidence seized incident to the defendant's arrest upon an invalid warrant. As was the case of the warrants in Berkeness, Go-Bart, Grau and Nathanson, the sworn complaint failed to provide sufficient information from which a magistrate could find probable cause.

In Aguilar v. Texas, 378 U.S. 108 (1964), the first post-Mapp case involving a search warrant issued without probable cause, the Court saw no reason to apply any lesser sanction to evidence seized under color of such a warrant than the one it had recently adopted for warrantless searches.[4] See also Marcus v.

Search Warrant, 367 U.S. 717 (1961) (overbroad search warrant). The affidavit used to procure the Aguilar warrant contained only the conclusory allegation--based upon "reliable infor-

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4 Unlike a warrant issued with a mere defect in form, a warrant issued in the absence of probable cause defeats the central purpose of the Fourth Amendment. Cf. United States v. Chavez, 416 U.S. 562 (1974); United States v. Giordano, 416 U.S. 505 (1974) (both holding that not all defects in a Title III wiretap application justify suppression of evidence); United States v. Caceres, 440 U.S. 741 (1979) (violation of IRS regulation does not justify excluding fruits of illegal wiretap).

Numerous courts have discussed application of the exclusionary rule to "technically" defective warrants, e.g. Commonwealth v. Sheppard, 387 Mass. 488 (1982); Gifford v. State, 630 S.W.2d 387, 391 (Tex. Ct. App. 1982); United States v. Christine, 687 F.2d 749, (3d Cir. 1982). See Mertens and Wasserstrom, note 1, supra, at 433-437 (discussing "technical violations"). The absence of probable cause is surely not a "technical" defect.

mation from a credible person"--that drugs were kept in a certain place in violation of the law. Aguilar v. Texas, supra, 378 U.S. at 109.

Spinelli v. United States, 393 U.S. 410 (1969) and Whitely v. Warden, 401 U.S. 560 (1971) also involved warrants issued upon affidavits which a magistrate found sufficient for probable cause, but which failed to pass muster upon review. Rejecting the warrant in Spinelli, Justice Harlan wrote:

> In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause; that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial; that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense; and that their determination of probable cause

> should be paid great deference by reviewing courts. But we cannot sustain this warrant without diluting important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry.

393 U.S. at 419 (citations and footnotes omitted). The warrant affidavit in Whitely contained nothing more than a police officer's conclusion that the defendant was guilty of breaking and entering. The record failed to show that the magistrate had any additional information available to him which would have amounted to probable cause. Finding no justification for the search, this Court reversed Whitely's conviction.

The preceding historical survey reveals that this Court has already rejected Petitioner's position: that the sole protection provided by the Fourth Amendment warrant clause is a magis-

trate's satisfaction, on the basis of a police affidavit, that constitutionally required probable cause has been established. In each of the cases from Byars to Whitely police officers submitted an affidavit to a magistrate in good faith, and a magistrate in good faith found probable cause. Nevertheless, this Court has required judicial review of the magistrate's initial determination of probable cause whenever a defendant has challenged the sufficiency of the warrant, and has reversed the magistrate whenever probable cause was lacking.[5]

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5 The formal "exclusionary rule" had its genesis in Boyd v. United States, 116 U.S. 616 (1886) and Weeks v. United States, 232 U.S. 383 (1914), but the principle that a warrant unsupported by probable cause is invalid is much older.

Long before Weeks, this Court declared a warrant issued without a showing of probable cause to be a legal nullity, Ex parte Burford, 7

(Footnote continued)

The inherent limitations of the warrant issuing process require a review procedure. Warrant affidavits "are normally drafted by non-lawyers in the midst and haste of a criminal investigation." United States v. Ventresca, supra, 380 U.S. at 108. They are submitted for approval in an Ex parte hearing without the benefit of an adversary presentation of Fourth Amendment law as it applies to the facts alleged. Franks v. Delaware, 438 U.S. 154, 169 (1978). The process is marked by urgency and a heavy reliance upon hearsay which impair the magistrate's ability to probe the underlying evidence. Id.[6]

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[5](continued)
U.S. (3 Cranch) 448 (1806) and discharged a prisoner held on an inadequate arrest warrant. But even if the birth of the exclusionary rule can be regarded as recent, that does not also make it illegitimate.

Furthermore, magistrates vary widely in their legal expertise and training. Shadwick v. City of Tampa, 407 U.S. 345 (1972). If a magistrate's issuance of a warrant were to be conclusive, police officers would have a strong incentive to seek out the least demanding magistrate. See United States v. Karathanos, 531 F.2d 26, 34 (2d Cir.) cert. denied, 428 U.S. 910 (1976). Magistrates would also have less reason to be careful in applying the probable cause standard, since a "reasonable mistake" would have the same legal effect as a correct decision.

The arguments for reversal, although expressed in terms of solicitude for the

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6 In many jurisdictions magistrates may even issue warrants over the telephone. See, e.g., Fed. R. Cr. P. 41(c)(2); Ariz. Rev. Stat. Ann. § 13-3914(c) (West 1978 and Supp. 1981); Cal. Penal Code §§ 1526(b), 1528(h) (West Supp. 1981).

role of the magistrate and a preference for warrants, in fact betray a startling distrust of the judiciary in general. This Court has not encouraged reviewing judges to conduct the kind of wholesale, de novo review which the Petitioner seems to envision. Rather, it has repeatedly emphasized that a magistrate's decision should be granted great deference. Recognizing "that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract," this Court, in United States v.Ventresca, supra, wrote:

> A grudging or negative attitude by reviewing courts towards warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.
>
> This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's believe that probable cause exists without

> detailing any of the "underlying circumstances" upon which that belief is based .... Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, where these circumstance are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a commonsense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

380 U.S. at 108-109 (citations omitted).

No one criticizes the following situation: A police officer with an actual belief that probable cause exists approaches a magistrate and applies for a warrant. Unfortunately, he is mistaken;

he lacks probable cause; the magistrate so finds and refuses to issue the warrant, since the Fourth Amendment explicitly forbids her to do so. No one has argued that the magistrate ought to do otherwise; everyone agrees that the policeman must improve his showing.

It is only when the magistrate erroneously finds probable cause that the situation in this case arises. The only "good faith" exception which can be derived from the matter of Lance and Susan Gates is a rule designed entirely to protect well-meaning policemen from being misled by incompetent magistrates, that is, when the police fail to present or to collect additional information which could have supported a warrant in reliance upon the magistrate's finding. There is no reason to suppose that this problem--if it exists--is a recurring

one. If there was it would not be a reason for rendering such magistrates' decisions virtually unreviewable. It is one thing to defer to a magistrate's finding of probable cause in a doubtful case, and quite another--as Petitioner urges this Court to do--to uphold a search even though the constitutional requirement of probable cause is not met.

Petitioner argues that a lesser standard should apply to test warrants than to scrutinize warrantless searches in order to encourage the police to seek a magistrate's approval. But encouraging the police to seek warrants would avail nothing if magistrates were no longer bound by the probable cause requirement. The Fourth Amendment requires not only that a neutral and detached magistrate pass over the evidence supposed to justify an intrusion, but also that the

magistrate look sharp to discern whether that evidence is enough for probable cause. Magistrates should be expected--indeed compelled--to follow the Constitution, not its close approximation. Otherwise, the process for the issuance of a warrant is likely to degenerate into perfunctory approval of a police investigation.

II.

THE BENEFITS OF THE PRESENT EXCLUSIONARY RULE FAR OUTWEIGH ITS COSTS

Critics of the exclusionary rule have seized on language in recent cases which have weighed the benefits of extending the exclusionary rule to new fields--grand juries, United States v. Calandra, 414 U.S. 338 (1974); civil litigation, United States v. Janis, 428 U.S. 433 (1976); habeas corpus for state prisoners, Stone v. Powell, 428 U.S. 465 (1976)

--against the cost of exclusion. In each case, this Court has measured the additional deterrent effect upon police conduct which would result from an extension of the rule against the "cost," the exclusion of probative evidence of guilt. What is striking about each of these cases is that all of these opinions presume the continuation of the exclusionary rule. This Court has consistently gauged "additional" deterrence from the Mapp baseline. Without Mapp, the logic of the decisions in Calandra and Janis collapses. The same would be true if this Court were to undermine Mapp by adopting a "reasonable mistake" or "good faith" exception. The issue on reargument is not really a matter of bureaucratic cost/benefit analysis, but rather a fundamental decision about the value of the Fourth Amendment guarantee

to our society.[7]

A. The "Cost" of the Exclusionary

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7 Testimony before Congress on the exclusionary rule makes it clear that proponents of modification are actually unhappy with the values enshrined in the Fourth Amendment. Professor Steven Schleisinger of Catholic University, author of Exclusionary Injustice (1977) explained his theory that:

> [S]ince criminal activity is not private, a location is not private if activities of great public interest, crimes, are committed or concealed there.... One could put this argument in another way. A person who uses his home to store dead bodies or a drug factory forfeits what would ordinarily be his right to privacy.

Exclusionary Rule Hearings 49.

Another critic, Wayne W. Schimidt, Exec. Dir., Americans for Effective Law Enforcement, made explicit his view that "reasonable suspicion" rather than probable cause should be the standard for the police searches. Exclusionary Rule Hearings, 223-225, 783.

Rule is Exaggerated.

Opponents of the exclusionary rule, and proponents of a "good faith" or "reasonable mistake" exception identify two "costs" associated with the rule as it now stands. First, they contend that the rule unreasonably interferes with the prosecution of criminal cases. Second, they argue that the present rule places an unreasonable burden on the judicial system.

Convincing statistical evidence about the number of prosecutions declined or convictions lost by virtue of the exclusionary rule is not available. But by its nature the Fourth Amendment makes police work and prosecution more difficult. There is no doubt that random "spot checks" of automobiles[8] or

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8 See Delaware v. Prouse, 440 U.S. 648 (1979).

strolling citizens,[9] and forced entries into private homes on mere suspicion[10]--both prohibited by the Fourth Amendment--would turn up evidence of crime. But the choice between the efficiency of ruthless and unfettered police authority and the security of the individual was made in 1791 when the States ratified the Bill of Rights. Furthermore, the evidence which the United States cites in its Brief as amicus curiae has little to say about the specific issue before this Court: the "cost" of reviewing warrants in suppression hearings. (See Supp. Br. in Support of Reversal, at 46-49). Despite the unstated premise that magistrates are incapable of following the law established by this and other courts, there is every

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9 Sibron v. New York, 392 U.S. 40 (1968); Brown v. Texas, 443 U.S. 47 (1979).

10 Mapp v. Ohio, 367 U.S. 643 (1961).

reason to believe that the system of reviewing warrants functions well, not poorly. In the almost seventy year history of the exclusionary rule, very few of this Court's decisions have involved invalid search warrants; fewer still have involved warrants issued without probable cause.[11]

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11 The effect of the exclusionary rule upon convictions and prosecutions for violent crime is minimal. See Canon, Ideology and Reality in the Debate over the Exclusionary Rule: A Conservative Argument for Its Retention, 23 So. Tex. L.J. 559, 576-577 (1982). Despite the highly charged rhetoric of critics, the facts do not bear out the impression that the exclusionary rule frees thousands of violent criminals. Indeed, the brief of the United States suggests, not that the rule results in the acquittal or dismissal of many serious felony charges, but rather that some persons freed on the basis of a Fourth Amendment violation later committed other crimes including "crimes against persons or property." Supp. Br. Supporting Reversal at 49.

(Footnote continued)

There are other reasons why the "cost" of the exclusionary rule is far less than portrayed in the briefs urging reversal. From the beginning, this Court has accommodated the exclusionary rule to

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11 (continued)

This Court's own experience with warrant cases confirms the view that invalid warrants are most often issued in "victimless" crime cases: narcotics, e.g. Giordenello v. United States, supra; gambling, e.g., Spinelli v. United States, supra; or obscenity, e.g. Marcus v. Search Warrant, supra; Stanley v. Georgia, 394 U.S. 557 (1969). In an earlier day, alcohol rather than drug traffic was the prime subject of this Court's search warrant cases, e.g., Byars v. United States, 273 U.S. 28 (1927); Go-Bart v. United States, 282 U.S. 344 (1931), Grau v. United States, 287 U.S. 124 (1932).

It does nothing to minimize the deleterious effects of drug abuse, or to minimize the seriousness of drug offenses, to recognize that violations of the drug laws, like violations of the Fourth Amendment, are mala prohibita not mala in se. Of these prohibitions, the Fourth Amendment is the more fundamental to our way of life.

the legitimate interests of law enforcement. Linkletter v. Walker, 381 U.S. 618 (1965) limited retrospective application of the exclusionary rule. See also Desist v. United States, 394 U.S. 244 (1969); United States v. Johnson, ____ U.S. ____, 102 S.Ct. 2579 (1982). The Linkletter rule prevents the reversal of convictions obtained by searches performed in reliance upon established precedent. In Stone v. Powell, 428 U.S. 465 (1976) this Court, for all practical purposes, eliminated violations of the exclusionary rule as a ground for federal habeas corpus relief for state prisoners. Other recent decisions have limited standing to litigate Fourth Amendment issues to persons with a "legitimate expectation of privacy" in the object seized or the place subjected to search. Rawlings v. Kentucky, 448 U.S. 98 (1980);

United States v. Salvucci, 448 U.S. 83 (1980). Notwithstanding its pronouncement in Katz v. United States, 389 U.S. 347, 357 (1967) that all warrantless searches and seizures are "per se" unreasonable, this Court has carved out exceptions to the warrant requirement for searches and seizures conducted under exigent circumstances, Warden v. Hayden, 387 U.S. 294 (1967); for border searches, United States v. Ortiz, 422 U.S. 891 (1975); seizures of contraband in plain view, Coolidge v. New Hampshire, 403 U.S. 443 (1971) and for searches of automobiles, Carroll v. United States, 267 U.S. 132 (1925).

These exceptions and limitations strike a reasonable balance between the rights which the Fourth Amendment protects and the needs of law enforcement. To adopt a "good faith" or "reasonable

mistake" exception, to give violators of the Fourth Amendment the benefit of the doubt, would tip the scales too far to maintain the security the Fourth Amendment now affords.

The second purported cost of the present exclusionary rule provides even less support for modification. Currently, a reviewing court examines the same affidavit which was presented to the magistrate to determine whether the allegations were sufficient for probable cause. The process requires a substantial evidentiary hearing only infrequently. The magistrate's finding prevails in marginal cases. United States v. Ventresca, supra; Jones v. United States, 362 U.S. 257 (1960). A "good faith" exception would shift the focus from the affidavit to the magistrate's or police officer's state of mind, and compel fact-

finding on these matters which are, at best, collateral to the purposes of the Fourth Amendment. Nor would such a change in the exclusionary rule be likely to dampen the enthusiasm of defendants or their counsel for suppression motions. True, it might be easier for a trial court summarily to dispose of motions which could not even allege unreasonableness or bad faith; but the hearings which would be held would become far more elaborate and complex than they are at present.[12]

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12 Judge Wilkey, for example, envisions a mini-trial to fix an appropriate penalty for a police officer who violates the Constitution. Wilkey, Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule 19 (1982), reprinted in Exclusionary Rule Hearings at 448. Sue M. Johnson, who testified before Congress for the Police Executive Research Forum, would have the Court conduct a searching inquiry into the training and disciplinary practices of a police department before decid-
(Footnote continued)

Modifying the exclusionary rule to permit the use in the prosecution's case-in-chief of evidence seized illegally, but in good faith, would not achieve significant economies in the use of judicial resources. It would, however, make unnecessary inroads into the Fourth Amendment's guarantee of security from intrusions by the government.

B. The Exclusionary Rule Is An Effective Deterrent to Improper Searches and Seizures

Petitioner's Brief attempts to persuade this Court that the exclusionary rule cannot deter police officers or mag-

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12(continued)
ing whether to apply the exclusionary rule. Exclusionary Rule Hearings 314-15 (prepared statement).

These proposals exemplify the kind of burden which ad hoc decisionmaking on good faith would entail.

ist ates from making reasonable errors of judgment (Pet. Br. on Reargument at 15), and should therefore be limited to cases of deliberate official misconduct. In effect, the State proposes to treat the exclusionary rule as if it were designed to punish lawbreakers. But this has never been--nor should it become--the objective of the exclusionary rule.

The exclusionary rule is ill-suited to be a means of punishment. Its impact on the persons directly responsible for an illegal search is indirect.[13] A police officer who conducts an illegal search--even intentionally--will not lose a day's pay or spend an hour in jail as a

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13 Exclusionary Rule Hearings, supra, 279 (statement of Norman Darwick, Exec. Dir. International Association of Chiefs of Police); id. at 281-282 (statement of Sue M. Johnson, Deputy Dir., Police Executive Research Forum).

result of a suppression hearing.[14]

The statistical evidence on the exclusionary rule is inconclusive, in large part because there are no meaningful comparative statistics from the era before Weeks or Mapp.[15] But there is

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14 Judge Wilkey advocates a system in which the court would punish an officer who violated the Fourth Amendment but admit the evidence at trial. Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence? 62 JUDICATURE 215, 231 (1978). The biggest flaw in this system is that defendants will have no incentive to present Fourth Amendment issues to the court.

15 See Cannon, Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention, 23 So. Tex. L.J. 559 (1982) which contains a thorough review and critique of the empirical literature, including Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Cal. L. Rev. 665 (1970) and Spiotto, Search and Seizure: An Empirical Study of The Exclusionary Rule and Its Alternatives, 2 J. Legal Studies, 243 (1973). Mertens and Wasserstrom, note 1, supra, n. 103 at 387.

powerful anecdotal evidence of deterrence. See, e.g., Exclusionary Rule Hearings 806 (letter, Judge Herbert Stern to Senator Mathias). Certainly litigation of suppression motions continues, but the worst cases are rarely as bad as they were before Mapp.[16] Indeed, it is difficult to understand why there might be a "chilling effect" on police conduct from the exclusionary rule, if the rule is not a deterrent. (See Supplemental Brief of the United States Supporting Reversal at 52.)

By excluding evidence seized unlawfully, the courts--through prosecutors who must try cases without such evidence--communicate Fourth Amendment principles to the police. Today it is

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16 Indeed, the United States admits as much in its amicus brief (Supplemental Br. Supporting Reversal at 36).

common for police departments to issue guidelines and bulletins to advise officers in the field of new developments in Fourth Amendment law.[17] It is by educating the police and incorporating the protections of the Fourth Amendment into police training that the exclusionary rule curbs "reasonable" violations of the Fourth Amendment and encourages due respect for the Constitution.

Without the exclusionary rule, this process of education would come to an end. Prosecutors and police chiefs would

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17 See, Wasserstrom and Mertens, note 1, supra, at 399-400. E.g., District of Columbia Metropolitan Police Dept., General Order 304.10, Police-Citizen Contacts, Stops, Frisks and Motor Vehicle Checks (1973) (standard for articulable suspicion), General Order 702.1 Arrest and Bench Warrants (1975) General Order 602.1 Automobile Searches and Inventories (1972).

have little incentive to inform officers in the field about the elements of, for example, probable cause and articulable suspicion. Officers "engaged in the often competitive enterprise of ferreting out crime" Johnson v. United States, 333 U.S. 10, 13 (1948) are not well able to sift facts dispassionately to determine the presence or absence of probable cause. How much less so if they must make these decisions without guidance? To an even greater extent than has been true of warrantless searches, the exclusionary rule has been highly effective in restraining the issuance of search warrants unsupported by probable cause. This is so because suppression hearings allow the courts to apply the universal standard of probable cause to ever-changing circumstance, and to assess the importance of differences among the

countless variations of cirumstance a magistrate must encounter.

Although magistrates do not enjoy the benefits of an adversary presentation of the law and the facts, they are likely to have superior training in the law and a greater opportunity to reach a careful and reasoned decision than do police officers in the field. They are therefore better able to engage in, and make use of, the continuing dialogue with the courts through which the law of the Fourth Amendment evolves.

The result of the proposed "modification" of the exclusionary rule would be to relegate enforcement of the warrant clause to the virtually unfettered and unreviewable discretion of magistrates without even the guidance of an evolving body of law. Exclusion would not be available unless a defendant could show

that the magistrate's erroneous finding of probable cause was so far wrong as to be "unreasonable". A court would have little cause to render an advisory opinion on whether probable cause actually existed. Nor would a person aggrieved by an illegal search have any civil remedy for a constitutional violation. An officer who executed a search warrant would certainly enjoy "good faith" immunity to a damage suit. And unless the plaintiff could show "a clear absence of all jurisdiction," Stump v. Sparkman, 435 U.S. 349, 356-57 (1978) the magistrate's immunity would be absolute.

Aside from the potential evils of prosecutors and police "shopping" for a magistrate more willing to authorize a warrant, or the considerable risk that some magistrates, if only a few, will

abuse their discretion, another threat to the Fourth Amendment lies in the absence of a process for expounding and explaining probable cause. Areas where Fourth Amendment principles are now settled and clear-cut would be muddled in practice, and those areas where the law is changing or has begun to reach new circumstances, would become positively impenetrable.

The "cost" of the present system is modest: the exclusion of evidence in a very few cases. The cost of the alternative is extravagant: the replacement of the probable cause requirement of the Constitution by some unenforceable standard of "probable cause, more or less."

Even if one disagrees with the outcome of this case below, the Illinois courts' decisions illustrate a system working as it should. Three state courts agreed that the affidavit in support of

the warrant was insufficient. They reached, and decided, an unsettled issue of state and federal constitutional law. Henceforth, Illinois magistrates will be better able to apply the Aguilar-Spinelli doctrine, and will demand more from the police before they rely upon an anonymous tip. It is basic to our system of jurisprudence that the law must develop in this way--by deciding cases as they come along--rather than by legislating guidelines to resolve all possible hypothetical disputes.

Cardozo's question is beguiling: Why should "[t]he criminal...go free because the constable has blundered?" People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587, cert. denied 270 U.S. 657 (1926). But the answer is plain: unless we set up guideposts, even fences, along the way, constables and magistrates may

blunder into our homes and rob us of a priceless inheritance--our constitutional guarantee of liberty.

CONCLUSION

The judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

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No. 81-430

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THE STATE OF ILLINOIS,

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vs.

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Respondents.

ON WRIT OF CERTIORARI
to the Supreme Court of Illinois

Brief of the National Association of Criminal Defense Lawyers, California Attorneys For Criminal Justice, and the State Public Defender of California, as Amici Curiae in Support of Respondents

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QUESTION PRESENTED

Whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that search and seizure at issue was consistent with the Fourth Amendment.

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INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers was founded 25 years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, to promote the proper administration of crimnal justice and to encourage the integrity, independence and expertise of the defense lawyer.

California Attorneys for Criminal Justice is an organization of over 1,200 California lawyers, most of whom concentrate on the defense of criminal cases. It has an active educational program for the defense bar. It has a heightened interest in the federal interpretation of the Fourth Amendment with the recent passage of a California constitutional amendment possibly limiting the use of the California Constitution as an independent ground for the exclusion of illegally seized evidence in California courts.

The State Public Defender of California has the major responsibility for representation of indigent criminal defendants on appeal.

The parties have given their consent to the filing of this amicus curiae brief; the letter of consent is on file.

Amici are criminal defense lawyers who spend the major portions of their professional lives defending persons accused of crimes. We rise to the defense of the exclusionary rule of the Fourth Amendment because it demonstrates and makes effective the principle that no one in these United States is above the law. Judicial approval of the lawless enforcement of law, even in "good faith," would undercut that principle.

SUMMARY OF ARGUMENT

The exclusionary rule is part of Fourth Amendment jurisprudence because it is necessary to encourage legal searches and seizures by the government and to discourage government agents from invading the security and privacy of citizens. The diminution or elimination of the exclusionary rule would act as a judicial invitation to violate constitutional rights of persons whom the government suspects of crime.

The suggested modification of the exclusionary rule by a "good faith" exception should not be ruled upon in this case because not raised by the parties in a timely fashion or in the courts below. If this Court does reach the merits, it will find the exclusionary rule does serve its salutory purpose, and a "good faith" exception would freeze the development of Fourth Amendment law, add an additional fact finding layer to the procedures in criminal cases, bring an ungovernable arbitrariness to Fourth Amendment decisions and put a premium on police ignorance and poor training. A "good faith" exception regarding the necessary showing of

probable cause to obtain a search warrant would make the Warrant Clause of the Fourth Amendment ineffective and would allow the decision of magistrates to invade the privacy and security of homes and personal effects to be immune from any effective judicial review.

ARGUMENT

I

CERTIORARI SHOULD BE DISMISSED AS TO THIS ISSUE FOR WANT OF A PROPERLY PRESENTED FEDERAL QUESTION

"We deal here with a limitation imposed by Congress upon this Court's authority to review judgments of state courts. It is a *jurisdictional limitation, Cardinale v. Louisiana*, 394 U.S. 434, 438, 22 L.Ed.2d 398, 89 S.Ct. 1161 (1969), that has always been interpreted with careful regard for the delicate nature of the authority conferred upon this Court to review the judgments of state courts of last resort. . . ." (*Chambers v. Mississippi*, 410 U.S. 284, 308, 35 L.Ed.2d 297, 216 (1973) [Rehnquist, J., dis.; emphasis added].)

The procedural history of the formulation of this issue and its presentation to this Court is well documented in the dissent to the order restoring this case to the calendar for reargument. (*Illinois v. Gates*, 81-430, 32 Cr.L. 4105.) Suffice it to say that petitioner conceded ". . . the good faith exception was not raised in the present petition, not argued directly by the State's Attorney in the Illinois reviewing courts, . . ." (Motion to Enlarge, p. 2, item 4.)

Nevertheless, the state asked this Court to rely on previous "decisions waiving the strict requirements of the predecessors to United States Supreme [Court] Rules 21(1)(a) and (h), . . ." (Motion to Enlarge, p. 3, item 4.) In doing so, Illinois mistakenly utilized authority justifying enlargement of the question presented in cases arising in the federal courts.[1] A fundamental difference exists here: *this case did not arise in*

[1] Illinois' reliance on *Blonder-Tongue Labs v. University Foundation*, 402 U.S. 313, 319-321 (1971) is misplaced for another reason. Besides being a federal case, "[c]ourts had discarded the requirements of mutuality . . ." (*Id.*, at 322; see *id.*, at 322 fn. 9 and 10, and *id.*, at 325 fn. 13, both citing an extensive list of federal cases which had previously

[Fn. 1 cont.]

federal court.[2] Therefore, the jurisdiction of this Court is limited by statute to questions presented to and decided by the court of the originating state.

[Fn. 1 cont.]

discarded the rule; see also *id.*, at 362 fn. 14 which had an extensive list of state court decisions also discarding the mutuality rule.) Thus, in the 35 years of the "judge-made doctrine" (*id.*, at 320), a majority of the state and federal jurisdictions passed on the rule and discarded it prior to this Court's decision.

[2] Illinois' reliance on cases cited in Mr. Justice Black's in *Standard Industries v. Tigrett, Inc.*, 397 U.S. 586, 587 (1970) is also misplaced. In each of those cases the issue added to the questions presented had previously been passed on by the originating state's courts:

In *White v. Maryland*, 373 U.S. 59, 83 S.Ct. 1050 (1963), the issue presented in the petition for certiorari (*i.e.* whether *Hamilton v. Alabama*, 368 U.S. 52 applied retroactively) had been presented to the Maryland Court of Appeal at 227 Md. 615, 625, 177 A.2d 877.

In *McConnell v. Rhay*, 393 U.S. 2, 89 S.Ct. 32, the issue of retroactive application of *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, was properly presented to the Washington Supreme Court in the Petition for Writ of Habeas Corpus prior to this Court's grant of certiorari. (*Id.*, at 4.)

In *Tehan v. Shott*, 382 U.S. 406, 86 S.Ct. 459 (1965), this Court requested briefing of an issue not presented in the Petition for Writ of Habeas Corpus but fully presented to and passed on by the originating state in *Pinch v. Maxwell*, 3 Ohio St.2d 212, 210 N.E.2d 883. (*Id.*, at 455, fn. 3.)

In *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731 (1965) petitioner's direct appeal was final prior to this Court's decision in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961); however, petitioner thereafter presented the question at issue (*i.e.* retrospective application of the *Mapp* holding) to the state of Louisiana in a Petition for Writ of Habeas Corpus. Following denial there the same issue was properly presented to the federal courts in a Petition for Writ of Habeas Corpus. Certiorari was properly granted thereafter.

In *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229 (1965), petitioner was found guilty by a jury after it was instructed that it could consider the defendant's failure to testify as evidence of guilt. The California Supreme Court affirmed the conviction. Thereafter, this Court decided *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1926 (1965). Next, the California Supreme Court ruled that this procedure squared with *Malloy* (see, *e.g.*, *People v. Modesto*, 62 Cal.2d 436, 398 P.2d 752). Thus, when this Court requested briefing on this issue, California had previously passed on the question.

Thus, in every case cited by Illinois supporting enlargement of the question presented, the state courts at issue had previously passed upon the question prior to this Court's grant of certiorari.

Certiorari was properly granted to review the Illinois Supreme Court's ruling on the original question. However, enlargement of the questions presented on certiorari was improvidently granted to review a question never presented or passed upon by the Illinois state court.

Title 28 U.S.C. § 1257 provides in pertinent part as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> ". . . .
>
> "(3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution treaties or statutes or commission held or authority exercised under, the United States."

The legislative history of 28 U.S.C. § 1257 commenced with the first session of the First Congress, section 25 of the Judiciary Act of 1789 (1 Stat. 73). Despite legislative revision over the centuries, the same rules apply under the present statute.

Thus, in *Cardinale v. Louisiana, supra*, 394 U.S. 437, 438, this Court clarified that "[i]t was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."

In *Crowell v. Randell*, 10 Pet. 368 (1836), Justice Story concluded that the Judiciary Act of 1789, C. 20, § 25, 1 Stat. 85, denied this Court jurisdiction unless a federal question was *raised* and *decided in* the *state court* below. "If both of these do not appear on the record, the appellate jurisdiction fails." (*Id.*, 10 Pet. 368, 391.) The *Cardinale* Court relied upon *Crowell* and a substantial line of authority supporting this construction of 28 USC § 1257 commencing with *Miller v. Nicholls*, 4 Wheat 311, 315 (1819). (*Cardinale v. Louisiana, supra*, 394 U.S. at 438.)

And this authority stands undisturbed today. (*Tacon v. Arizona*, 410 U.S. 351, 352, 93 S.Ct. 998 (1973); *Moore v. Illinois*, 408 U.S. 786, 799, 92 S.Ct. 2562 (1972); *Stanley v. Illinois*, 405 U.S. 645, 658, n. 10, 92 S.Ct. 1208 (1972); *Hill v. California*, 401 U.S. 797, 91 S.Ct. 1106 (1971) [opn. of White, J.]; *University of California Regents v. Bakke*, 438 U.S.

365, 283, 98 S.Ct. 2733 (1978) [opn. of Powell, J.]; *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889 (1981) [opn. of White, J.].)

Moreover, "there are *powerful* policy considerations underlying the statutory requirement and [this Court's] own rule that the federal challenge to a state statute or other official act be presented first to the state courts." (*Webb v. Webb*, 451 U.S. at 499, *supra*; emphasis added.) The most frequently cited policy involves:

> "[p]rinciples of comity in our federal system requir[ing] that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements. As the Court has elsewhere observed, this principle of comity requires 'a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the State and their institutions are left free to perform their separate functions in their separate ways.' Younger v. Harris, 401 US 37, 44, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971)." (*Webb v. Webb, supra*, 451 U.S. at 500.)

The same principle of comity supports the "'properly-raised-federal-question' doctrine" as that justifying the "exhaustion-of-state-remedies doctrine applicable to federal habeas corpus review of the constitutional claims of state prisoners." (*Id.*; see, *e.g.*, *Picard v. Connors*, 404 U.S. 270, 275, 92 S.Ct. 509 (1971); *Drake v. Zant*, 449 U.S. 99, 101 S.Ct. 541 (1980); *Rose v. Lundy*, ___ U.S. ___, 102 S.Ct. ___ (1982); *Anderson, Warden v. Harless*, ___ U.S. ___, 102 S.Ct. ___ (Nov. 1, 1982); and also see Annotation 54 L.Ed.2d 873.)

Moreover, this Court has judicially recognized practical reasons for insisting that federal issues first be presented in the originating state court:

> "The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to

> avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case." (*Webb v. Webb*, 451 U.S. at 500-501, *supra*.)

Thus, substantial, indeed *powerful*, policy reasons exist for continued reliance upon the jurisdictional prerequisite of a properly raised federal question in cases arising in state courts.

The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question. (*Street v. New York*, 394 U.S. 576, 583, 89 S.Ct. 1354 (1969).) It is clear, however, that "[i]n reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, *whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented*. [Citations omitted.]" (*New York ex rel. Cohn v. Graves*, 300 U.S. 308, 318 (1936), and cases cited therein.)

Moreover, any failure by respondent herein to challenge the jurisdiction of this Court to consider the amended question on the merits cannot operate to vest jurisdiction *vis a vis* the second question. In *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553 (1975), this Court stated that while the parties may be permitted to waive nonjurisdictional defects, they may not by stipulation invoke the judicial power of the United States in litigation which does not present an actual case or controversy.

Any claim of jurisdiction to decide this issue on the merits is unprecedented in United States Supreme Court history. In limited circumstances, this Court has decided cases arising in state courts on issues not presented in the petition for certiorari. However, with the exception of one case, each of the issues, though not presented in the petition for certiorari, had been raised and decided in the state courts. (See, *e.g.*,

Boynton v. Virginia, 364 U.S. 454, 81 S.Ct. 182 (1961), and *Vachon v. New Hampshire*, 417 U.S. 478, 94 S.Ct. 644 (1974).)

Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097 (1981) marks the greatest deviation to date from the Title 28 UCS § 1257 requirements for jurisdiction. In that case, petitioners, three persons who were convicted of distributing obscene matter, challenged the revocation of their probations due to an inability to pay the fine on the basis that said revocations discriminated against them on the basis of wealth in violation of the equal protection clause of the Fourteenth Amendment. This was the only federal constitutional issue presented to the Court. However, the record disclosed that petitioners shared joint legal representation with the owner of the obscene book store and theater. It was also clear on the record that petitioners at all times operated under the belief that the owners would pay the fines imposed against them. After certiorari had been granted on the equal protection issue, the majority remanded the case for an evidentiary hearing regarding a potential, actual conflict of interest in violation of right to counsel and due process of law. The majority explained that jurisdiction did not fail for omitting to raise this issue below since "[t]he party who argued the appeal and prepared the petition for certiorari was the lawyer on whom the conflict-of-interest charge focused . . . [and, that it was] abundantly clear that the possibility of a conflict of interest was pointed out to the trial court at the revocation hearing. The State's Solicitor raised the issue repeatedly." (*Wood v. Georgia*, 450 U.S. at 261, *supra*.) Thus, the respondent was not prejudiced by lack of notice.

No such jurisdictional equivalents are present in this case. The state's attorney was not compromised by a conflict of interest that may have operated to prevent him from properly raising this issue in the trial court or state appellate courts. Moreover, the prospect that respondents would be faced with litigating this issue in this, the federal court of last resort, was never disclosed to respondents. Therefore, they were clearly prejudiced by lack of notice regarding this issue.

Had respondents had the opportunity to address this issue in the trial court, respondents may have defended with a state substantive law precedent or procedural bar controlling adjudication of the question. (See, *e.g. Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942 (1978); *Herb v. Pitcairn*, 324 U.S. 117 (1933); and *John v. Paullin*, 213 U.S. 583, 585 (1913); see also Comment, 61 Columbia L.Rev. 255 (1961).) Moreover, petitioner should not be rewarded by decision on the merits of this issue,

while the state's attorney waited until the last possible moment to bring this question to the review of *any* court.

In conclusion, the Court exceeds any precedent establishing jurisdiction pursuant to 28 U.S.C. § 1257 by consideration of this issue at this time. This is not the appropriate case to consider and decide this issue.

II

THE EXCLUSIONARY RULE ENCOURAGES LAWFUL POLICE CONDUCT

A. Common Sense Tells Us That The Exclusionary Rule Encourages The Police To Comply With The Fourth Amendment

It has been argued that at present the primary justification for the exclusionary rule is that it deters the police from violating the Fourth Amendment rights of our citizens to be free from unreasonable searches and seizures.[3] Expanding on this thesis, critics of the exclusionary rule assert that since empirical data fails to conclusively establish a deterrent effect,[4] the major justification for the exclusionary rule has collapsed. In addition, it has been argued that any deterrent effect is outweighed by the high "costs" of the rule.[5] With the critics, amici respectfully disagree and here assert our position that common sense demonstrates that the exclusionary rule *does deter* unlawful police conduct and that furthermore, no reliable empirical data has ever been developed to refute this court's continued reliance on the deterrent assumption.[6] Conversely, empirical

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[3] Brief for the People of the State of California as Amicus Curiae (pp. 24-29). Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U.Chi. L.Rev. 665, 671 (1970) [hereinafter cited as Oaks].

[4] Wright, *Must the Criminal Go Free if the Constable Blunders*, 50 Tex. L.Rev. 736, 741 (1972) [hereinafter cited as Wright].

[5] See Burger, C. J., dissenting in *Bivens v. Six Unknown Agents*, 403 U.S. 388, 416 (1971), relying on Oaks.

[6] Historically the exclusionary rule evolved as a personal constitutional right, rooted in this Court's concern for judicial integrity and the right of privacy. *Boyd v. United States*, 116 U.S. 616, 653 (1886); *Weeks v. United States*, 232 U.S. 383, 392; *Elkins v. United States*, 364 U.S. 206, 223 (1960); *Mapp v. Ohio*, 367 U.S. 543, 655-656, 658-659 (1961).

[Fn. 6 cont.]

data does establish that the exclusionary rule has a negligible impact in freeing persons charged with crimes.[7]

Upon adopting the exclusionary rule in California, Chief Justice Traynor stated the deterrence rationale clearly and succinctly:

> "Granted that the adoption of the exclusionary rule will not prevent all illegal searches and seizures, it will *discourage them*. Police officers and prosecuting officials are primarily interested in convicting criminals. Given the exclusionary rule and a choice between securing evidence by legal rather than illegal means, officers will be impelled to obey the law themselves since not to do so will jeopardize their objectives." (*People v. Cahan*, 44 Cal.2d 434, 448 (1955); emphasis added.)

Nobody has ever argued that either the exclusionary rule, or any other inducement, could ever compel 100% compliance with the Fourth Amendment by all magistrates, prosecutors and policemen at all times and all places in this country.[8] What the rule does accomplish is to "discourage" violation of, and encourage compliance with, the Fourth Amendment, by removing the primary incentive for conducting illegal searches and seizures--the securing of evidence which can be used to help convict persons accused of crimes. Degree of compliance with constitutional requirements will necessarily vary from state to state, from city to city, from police force to police force, and among individual officers on any force.[9] Nonetheless, what the exclusionary rule has done is

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[Fn. 6 cont.]

While we argue that rule's role in encouraging lawful police conduct amply justifies its existence, it need not stand on that basis alone. Any reevaluation of the exclusionary rule by this Court should consider its historic place in protecting the security and privacy of our citizens.

[7] Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention*, 23 So.Tex. L.J. 558, 577 (1982) [hereinafter cited as Canon, *Ideology and Reality*].

[8] Professor Amsterdam characterizes the rule as providing "a counterweight within the criminal jsutice system that prevents the system from functioning as an unmitigated inducement to policemen to violate the Fourth Amendment on every occasion when there is criminal evidence to be gained by doing so." (Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L.Rev. 349, 431 (1974) [hereinafter cited as Amsterdam].)

[9] Amsterdam, at 431-432.

simplicity itself. Violation of the Fourth Amendment is discouraged. Compliance with the Fourth Amendment is encouraged.[10]

Critics of the exclusionary rule must necessarily take an extraordinarily cynical, albeit unstated, view of this nation's police officers. At the core of this criticism is the assumption that policemen are concerned solely with "arrests" and not "convictions," and that therefore exclusion of illegally obtained evidence in the courtroom will not effect their behavior on the "streets." A necessary corrollary to that argument, in the warrant context, is that the magistrate who issues a warrant with insufficient probable cause is also indifferent to the ultimate disposition of the case and therefore cannot be encouraged to act within constitutional guidelines.

Again, common sense should intervene. There is no reason to suppose that police officers view their jobs from such a narrow perspective. On the contrary, both logic and experience suggest that the police are very concerned that criminals be arrested *and* convicted. It is, after all, their sworn duty to gather evidence for that purpose. It is certainly not unreasonable to assume that the police, to that practical end, have been encouraged by the exclusionary rule to comply with the Fourth Amendment. Clearly, no convincing empirical data has been developed to undermine that assumption.

B. Empirical Data On The Effect Of The Exclusionary Rule Is Consistent With The Assumption That The Rule Encourages Compliance With Constitutional Standards

Critics of the exclusionary rule can hardly be encouraged by the fact that the principal study purporting to show by empirical data that the rule does not deter was published 13 years ago, or that it relied on

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[10] Theoretically the case for the exclusionary rule's ability to encourage positive and discourage negative behavior would seem to be at least as strong as the case for the death penalty's deterrent effect. Critics of the exclusionary rule, who support the death penalty, have trouble with this dilemma (see Wright, at 739-740). Indeed, in view of the crime rate in general it could be argued that our entire criminal justice system is having little deterrent effect. (Canon, *Ideology and Reality*, at 564.) But few would argue that it should therefore be abandoned, or that those accused of crime be given a "good faith" exception.

statistical data now essentially 16 to 25 years out of date.[11] The thrust of Dallin Oaks' research was to study arrests for narcotics, weapons, gambling and stolen property in one city, Cincinnatti, before and after this court's *Mapp* decision. He reasoned that if the exclusionary rule was detering unlawful conduct, arrests for these crimes, which generally required evidence to be seized, would decline. Failing to clearly find such a decline, Oaks found the results "inconclusive."[12]

The most telling criticism of the Oaks research is the extremely limited nature of his sample. Assuming he had established that the Cincinnatti police were not, immediately after *Mapp*, being deterred from conducting unlawful searches, that would tell us very little about the overall effect of the exclusionary rule. The reaction of the Cincinnatti police might have nothing in common with the reaction of the police forces in, for example, Boston, Buffalo, New York, or Baltimore.[13] In addition, this dated material tells us nothing about how the police, even in Cincinnatti, have responded to the exclusionary rule during the last decade.

The only other empirical study that is generally relied on by critics of the exclusionary rule is the work of Oaks "successor," James Spiotto.[14] Spiotto's study was also confined to one city, Chicago, and likewise relies on statistical information that is now over 10 years out of date. It is thus subject to the same criticism as that of Oaks and also subject to a number of new ones.[15]

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[11] Back in 1974, Dr. Bradley Canon was already referring to the Oaks study as dated. (Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky. L.J. 681, 699 (1974) [hereinafter cited as Canon, *Is the Exclusionary Rule in Failing Health*].)

[12] In spite of the "inconclusive" nature of the data, Oaks stated his "personal opinion" against the rule, an opinion he specifically divorced from his research. (Oaks, at 755.)

[13] In fact other studies demonstrate that there was a dramatic decrease in arrests following *Mapp* in Baltimore and Buffalo. (Canon, *Is the Exclusionary Rule in Failing Health*, at 698-699, 706.)

[14] Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. Legal Studies 243 (1973) [hereinafter cited as Spiotto].)

[15] For a more detailed criticism of Spiotto's work see Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research* and *United States v. Calandra*, 69 N.W.U. L.Rev. 740 (1974) [hereinafter cited as Critique].)

Spiotto's study focused on motions to suppress filed in felony cases in Chicago trial courts during a 20-year period (1950-1970). He concluded that since the number of motions increased after the *Mapp* decision the exclusionary rule was not having a deterrent effect. However, this ignores the fact that the exclusionary rule was introduced in Illinois in 1924 and followed continuously since that time.[16] Thus, the Illinois criminal justice system should not have been at all affected by *Mapp*. The researchers conclusion was totally without a factual basis.

Spiotto also concluded that since an extremely high percentage of motions were granted by the Chicago trial courts (87% in 1969), this indicated a high degree of police misconduct.[17] However, the "windy city" can hardly be thought typical of the American Judicial System. In most other cities, only a very small percentage of motions to suppress are actually granted.[18]

Perhaps most critically, the whole notion of using statistics on motions to suppress as a gauge of the exclusionary rule's effect on police conduct is questionable. Since by definition virtually no motions will be filed prior to the advent of the exclusionary rule there can be no "base-line" to even attempt a before and after analysis.[19] And studies conducted after the rule's introduction fail to account for rival theories which might explain an increase in motions to suppress (*e.g.*, a rise in the number of drug cases--cases that almost always involve a search and seizure).[20]

The most recent, and extensive empirical studies on the effect of the exclusionary rule have been undertaken by Bradley Canon.[21] Unlike

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[16] Critique, at 754.

[17] Spiotto, at 247.

[18] In most cities motions to suppress are granted 10 percent of the time or less. (Canon, *Is the Exclusionary Rule in Failing Health*, at 721-722.) Chicago is in fact unique in having over 50 percent of search and seizures motions granted (*id.*, at 722). Commentators have noted that Chicago has no prosecutorial screening prior to a case going into the docket. They have also noted that city's peculiar reputation for intentional illegal raids (*id.*, at 720, and authorities cited at fn. 113).

[19] Critique, at 749-756.

[20] This explanation is entirely plausible since the number of arrests in drug cases increased dramatically from 1950 to 1969. (Oaks at 685.)

[21] See Canon, *Ideology and Reality*; Canon, *Is the Exclusionary Rule in Failing Health*; Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal*

[Fn. 21 cont.]

Oaks and Spiotto, the research was not confined to one city. The arrest statistics for "search and seizure" sensitive crimes were examined in 19 cities. In approximately half of those cities there was a dramatic decrease in the number of arrests following *Mapp*, and in the other one-half the effect seemed to be minimum or absent.[22]

Canon also inquired into the issuance of search warrants in several cities before and after *Mapp*. He reasoned that an increase in applications for search warrants would demonstrate that less illegal searches were being conducted and that police forces in general were attempting to comply with the Fourth Amendment. He discovered that prior to *Mapp*, the use of search warrants in most cities was virtually non-existent. Conversely, subsequent to this court's decision, a substantial number of warrants were obtained.[23] In addition, Canon's survey of law enforcement leaders demonstrated a wide-spread adoption, by police departments, of policies to implement this Supreme Court's *Mapp* and other search and seizure decisions.[24]

Canon concluded that "--the exclusionary rule can and does have a very real, although hardly universal, detterent effect on the police.[25] Thus, while overall the empirical data may be characterized as "inconclusive," it is, in fact, quite consistent with this Court's continuing assumption that the exclusionary rule does encourage the police to conduct searches that comport with the Fourth Amendment.[26]

[Fn. 21 cont.]

Level: The Case of the Exclusionary Rule, 15 Am.Pol.Q. 57 (1977) [hereinafter cited as Canon, *Testing the Effectiveness*]; Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?*, 62 Judicature 398 (1979) [hereinafter cited as Canon, *The Exclusionary Rule*].

[22] Canon, *The Exclusionary Rule*, at 400.

[23] Canon, *Ideology and Reality*, at 569, citing the work of Michael Ban.

[24] Canon, *Ideology and Reality*, at 569, citing the research of Professor Stephen Wasby.

[25] Canon, *The Exclusionary Rule*, at 400.

[26] *Stone v. Powell*, 428 U.S. 465, 492-493 (1976).

C. The Exclusionary Rule Is Seldom Implicated In The Release Of Persons Charged With Crimes, Particularly Crimes Of Violence

Popular rhetoric has placed upon the exclusionary rule the blame for many of the perceived ills of the criminal justice system.[27] However, the principal charge against the rule is that it is responsible for substantial numbers of criminals being let loose to prey on society. Therefore, it is argued the "cost" of the rule outweighs the benefit of deterring unlawful police conduct.[28] Empirical evidence shows that these charges are unfounded. Unlike the empirical data collected on the question of deterrence, this evidence is of recent vintage. It establishes that at every level of the criminal justice system the effect of the exclusionary rule, particularly on "violent" crime, is remarkably modest.

In the first instance several studies have demonstrated that a very low percentage of overall complaints are rejected by prosecutors because of search and seizure problems.[29] A 1978 report by the independent General Accounting Office reported on the impact of the exclusionary rule in federal criminal prosecutions. It was revealed that the federal prosecutors dropped charges because of search and seizure problems in only .2% of all cases presented for prosecution.[30] Data developed in a recent study by the Department of Justice is consistent with the GAO report. That study considered the effect of the exclusionary rule in state criminal prosecutions in California.[31] As in the GAO report, less than

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[27] See in particular Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 Judicature 214 (1978) [hereinafter, Wilkey, *The Exclusionary Rule*].

[28] Wilkey, *Constitutional Alternatives to the Exclusionary Rule*, 23 So.Tex. L.J. 590, 536 (1982); Supplemental Brief for the United States as Amicus Curiae Supporting Reversal, p. 19. [Hereinafter Brief of the Solicitor General.]

[29] Canon, *Ideology and Reality*, at 573-576, and studies cited.

[30] Report by the Comptroller General of the United States (GAO): *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* (1979) [hereinafter cited as GAO Report]. The report showed that .4 percent of all cases rejected by the federal prosecutors were for search and seizure reasons. Since approximately 50 percent of all cases were rejected this means that search and seizure problems were implicated in rejecting only .2 percent of the total cases. (*Id.*, at 13-14.)

[31] *The Effect of the Exclusionary Rule: A Study in California*, Criminal Justice Research Report (Dec. 1982) [hereinafter Department of Justice Study].

1% of all criminal complaints were dismissed by the prosecution for search and seizure reasons.[32]

These, and other studies also show that motions to suppress, while often made, are seldom granted,[33] and that even when granted the defendant will, in many cases, still be convicted.[34] Studies of the California appellate system reveal that the appellate courts are as likely to reverse a *granting* of a motion to suppress as they are to reverse a denial.[35]

The other significant fact revealed by these studies is the type of case affected by search and seizure violations. It is clear that any impact of the exclusionary rule is felt almost exclusively in the area of drug offenses and other nonviolent crimes. The principal empirical researchers, Oaks, Spiotto, and Canon have all recognized that the rule's effect is limited to victimless crimes and has virtually no effect on violent crimes.[36]

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[32] The study showed that over a three-year period, statewide, of all cases rejected for prosecution, 4.8 percent were rejected for search and seizure reasons. However, as only 17 percent of all cases presented were rejected this means that only .8 percent of the total number of felony cases were rejected for search and seizure reasons. (Dept. of Justice Study, p. 10.)

Some amicus briefs in this case have placed an undue emphasis on the fact that San Diego County and two (of 21) Los Angeles County offices reported a somewhat higher percentage. Brief of the Solicitor General, p. 48, n. 29; Brief Amici Curiae of Seven Former Members of the Attorney General of the United States Task Force on Violent Crime (1981), et al., in Support of the State of Ilinois, p. 17 [hereinafter Brief of the Seven Former Members].) It is frankly difficult to understand the significance of the percentage for one particular office when the total for that office is included in the statewide average. Obviously, as in any average some offices will be above the average and some will be below. Contrary to the Solicitor General's suggestion (p. 48 fn. 29), these figures certainly don't establish that the figures are higher for urban areas. They do not include the totals for Los Angeles County, nor do they give an indication what the percentage would be for the several urban San Francisco Bay area counties, or, for example, the urban areas of Sacramento, San Bernardino, or Orange Counties.

[33] Canon, *Ideology and Reality*, at 574-575.

[34] Over half of the defendants whose search and seizure motions were granted in federal court were still convicted. (GAO Study, p. 13.)

[35] Davies, *Do Criminal Due Process Principles Make a Difference?*, Am.Bar Foundation Res. J. 247, 266-267. Oaks, at 754; Spiotto, Note 8, Table 2, at 250; see also Canon, at 576-577.

[36] Dept. of Justice Study, p. 12; GAO Report, p. 7; Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L.Rev. 1027 (1974); Wright, at 741; Critique, at 774.

Both the Institute for Law and Social Research (INSLAW) Study in Washington, D.C. and the Department of Justice study in California find that over 70% of the cases dropped were drug cases.[37] [In evaluating that 70% figure it should be kept in mind that while most cases *rejected* for search and seizure reasons are drug cases, the overwhelming percentage of drug cases do *not* encounter any such problem and are successfully prosecuted.][38]

Starkly opposed to the statistics in drug cases is the role of the exclusionary role in crimes of violence. The INSLAW Study showed that of the over 5,000 persons charged with a violent crime *not one* was dropped by the prosecution because of search and seizure problems.[39] The Department of Justice study showed that out of over 530,000 felony cases processed in a four-year period in California only four involved murder cases with search and seizure problems.[40] In fact, these studies

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[37] Canon, *Ideology and Reality*, at 576.

[38] In this regard the statistics on felony drug cases affected by the exclusionary rule has been seriously misrepresented by amicus. In the "Seven Former Members" brief, p. 17, under Drug Felony cases rejected they list "California, Statewide (1976-1979) 71.5%, San Diego County (1980) 74%." However, what the Department of Justice report showed (at p. 2) was that these were the percentages of felony cases rejected that involved drugs, not the percentage of felony drug cases that were rejected. This is confirmed by statistics compiled by Thomas Y. Davies, which showed that in 1980, statewide, prosecutors rejected 938 drug cases out of 40,451 narcotics arrests for a total of 2.3 percent. (See Canon, *Ideology and Reality*, p. 574, citing Davies.)

The Solicitor General is responsible for a similar distortion in his brief at page 49. He states that "Prosecutors rejected approximately 30% of all felony drug arrests because of search and seizure problems" (NIJ Report 2.) But the 30 percent figure is solely for drug cases rejected in two of the 21 prosecutorial offices in Los Angeles County. As explained above, the statewide figure is not 70 percent *or* 30 percent, but 2.3 percent.

[39] Canon, *Ideology and Reality*, at 576.

[40] The Department of Justice study also attempted to demonstrate that defendants not prosecuted in San Diego County, because of search and seizure problems, were "career criminals." (*Id.*, at pp. 13-18; Brief of the Solicitor General, pp. 49-50; Seven Former Members Brief, pp. 17-18.) However, the data offered in this regard is clearly suspect. In the first instance there is no "base-line" figure to show the overall arrest record for persons arrested on felony charges. Thus, there is no basis for comparison to show that the non-prosecuted persons are particularly arrest-prone. In addition, the study admittedly uses arrest rather than conviction figures. These figures might simply demonstrate something this Court is now familiar with: the propensity of the San Diego police to arrest the same person time and again (see, *e.g.*, *Kolender v. Lawson* (81-1320, argued 11/8/82) where Mr. Lawson was arrested 15 times in 22 months by the San Diego Police. He suffered only one conviction.)

demonstrate that the great majority of felony cases are not affected at all by the exclusionary rule. They also show that the modest effect of the exclusionary rule on the criminal justice system is felt almost exclusively in the area of nonviolent crimes. The critics of the rule have, in the words of one commentator, exaggerated the costs a "hundredfold or more."[41]

D. This Court's Assumption That The Exclusionary Rule Encourages Compliance With The Fourth Amendment Is Well Founded

In 1976, a majority of this court, speaking through Justice Powell, strongly reaffirmed its belief in the exclusionary rule.

> "Evidence obtained by police officers in violation of the Fourth Amendment is excluded at trial in the hope that the frequency of future violations will decrease. Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.
>
> "We adhere to the view that these considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state-court convictions." (Fns. omitted; *Stone v. Powell, supra*, at 492-493.)

It is noteworthy that this court's continued reliance on the efficacy of the exclusionary rule was reached "[d]espite the absence of supportive empirical evidence," and with the specific recognition of the studies of Oaks, Spiotto and Canon. (*Id.*, fn. 34.) Certainly nothing in the way of empirical evidence has appeared since that decision which would support a reconsideration of that affirmation. On the other hand, as discussed in

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[41] Canon, *Ideology and Reality*, at 577.

the previous section, a number of empirical studies have appeared which demonstrate that the societal "cost" of the rule is not what its critics have previously claimed.

Logic and instinct tell us that the exclusionary rule encourages the best in our police and our courts and discourages the worst. That being the case, and with the principal of stare decisis in mind, this honorable court is urged to once again reaffirm its faith in that rule.

III

THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE FREEZES THE DEVELOPMENT OF FOURTH AMENDMENT LAW, ADDS AN ADDITIONAL FACT-FINDING LAYER TO THE PROCEDURES IN CRIMINAL CASES, BRINGS AN UNGOVERNABLE ARBITRARINESS TO THE EXCLUSIONARY RULE AND PUTS A PREMIUM ON POLICE IGNORANCE AND POOR TRAINING

A. Introduction

A good faith exception to the exclusionary rule makes eminent good sense if the purpose of that rule is to reward and punish police officials. Indeed, the point is so obvious that it would have been made by this Court in 1914 in *Weeks v. United States*, 232 U.S. 383 and in 1961 in *Mapp v. Ohio*, 367 U.S. 643 if that had been the motive of the Justices who then sat on this Court. Instead, their invocation of the rule was to condemn illegal police conduct without regard to whether it was reasonable for the police to be aware of the illegality. True, recent decisions of this Court, adequately discussed in other briefs filed in this case, have limited the exclusionary rule to applications where its deterrent effect on illegal police action can be anticipated to be most effective. But the good faith exception, even in its "objectively reasonable" form, strikes at the heart of the Fourth Amendment by freezing its protections in their current form. Growth and development, a sure sign of life and health, would be denied to the Fourth Amendment.

We illustrate this point with the discussion of the recent case of *Steagald v. United States*, 451 U.S. 204 (1981). That case, over the

dissents of two Justices, established an extremely important point: that in the absence of exigent circumstances or consent the combination of an arrest warrant and probable cause that the subject of that warrant was present in a third party's home is not sufficient to allow police invasion of that home without the authorization of a search warrant issued by a neutral magistrate. When the police made the entry into Steagald's home to execute their arrest warrant they were not acting lawlessly or even in an area of uncertainty. Two years previous to the entry into Steagald's home, the Fifth Circuit had decided that an officer holding a valid arrest warrant who reasonably believes its subject is within a home belonging to a third party need not obtain a search warrant to enter that home to execute the warrant. *United States v. Cravero*, 545 F.2d 406, 421 (1976). That decision was the final authority on the subject in Atlanta, where the entry into Steagald's home was made. Obviously, the DEA officers who entered Steagald's home were in perfect "good faith."

If the good faith exception now being proposed had been in effect at the time of the entry into Steagald's home, the legality of that entry would have been a moot point for Steagald. He would have no incentive to raise the issue since he would lose whether or not the entry had violated his rights to privacy and security under the Fourth Amendment. This Court would never have heard Steagald's case and the constitutional point might never have been decided. The warning of the majority of this Court that a rule allowing the police, acting alone, to decide when there is sufficient justification for searching the home of a third party for the subject of an arrest warrant "would create a significant potential for abuse" (451 U.S. at 215) would never have been given. *Steagald* was the perfect case for the application of the good faith rule and is the perfect example of why it should not be applied or adopted.

B. "Good Faith" In Practice

The briefs filed by petitioner and supporting *amici* tend to play down the procedural problems which would be created by the adoption of a good faith exception to the exclusionary rule. Thus, the Solicitor General states (Supplemental Brief, p. 58) "The good faith exception we propose is not likely to burden the courts unduly." He contrasts the "unwieldly and awkward inquiries" which would result if the subjective intent of a searching officer were in question and states that "a good faith exception" requires:

> "*Only* an objective assessment of the officer's conduct in light of the factual circumstances of a particular case and the extent to which the governing legal principles have been predictably articulated." (Brief of the Solicitor General, p. 58, emphasis supplied.)

In the first place, this would not be an intelligent jurisprudential approach to the issue. If the police do not have a subjective belief in the reasonableness of the search, the courts have no reason to look beyond that police decision of unreasonableness to see if some other police officer might have had a different opinion. (See discussion in *Agar v. Superior Court*, 21 Cal.App.3d 24, 30 (1971).)

In every case in which a good faith exception is relied upon by the prosecutor, there would first have to be a determination of whether the police conduct in the particular case was or was not in violation of the protections of the Fourth Amendment. Only after a finding was made that the conduct of the police did violate the Fourth Amendment could the issues posited by the Solicitor General come into play. First, the trial court judge (and then the reviewing judges and justices) would have to decide whether the governing legal principles which were violated by the officers have been "predictably articulated." If the rule were new, difficult to understand, or rarely invoked, the argument certainly would be made that it was not "objectively reasonable" for a policeman to be aware of it. Is it possible to avoid subjective elements and judgments in making the decision as to what legal principles have been "predictably articulated?" Will there be certain legal rules and principles which every policeman is expected to know and others which no policeman has to know? The answers to these questions show the essential arbitrariness of the good faith exception.

Of course, as to factual errors it has long been the rule that a policeman may act upon such factual conclusions as are objectively reasonable, regardless of the true state of facts. See *Hill v. California*, 401 U.S. 797 (1971) (officers mistakenly but reasonably arrest the wrong person and discover contraband in the course of a search incident to the arrest). To take the next step and to test whether the officer's belief in the legality of his actions was reasonable will require inquiry on quite a different level, and one which is necessarily subjective. Should it consider what training the officer has had, or what exposure he has had to recent decisions? Does it make a difference if a district attorney has advised him that his conduct is legal? If a magistrate in another case

involving the same kind of conduct by a policeman has ruled that it was not in violation of the Fourth Amendment, can the policeman continue this same conduct indefinitely? The difficult decisions which would be required in answering these questions demonstrate that the good faith of arresting officers is not an easy question and testing it would add considerable complexity to each search and seizure decision.

Further, a good faith exception to the exclusionary rule would create a large burden for a conscientious police officer. The incentive provided by the good faith exception would be to encourage ignorance of Fourth Amendment guarantees.

It is sometimes argued that the exclusionary rule is too complex to be an effective deterrent to illegal police conduct. Such an argument takes the very few cases which are difficult to understand, complex and confusing and assumes those cases are representative of all search and seizure issues. In fact, every court in this nation which handles criminal cases deals with search and seizure issues on a daily basis, and disposes of those issues under well settled principles of law. It is unsound reasoning to believe the small percentage of difficult cases removes the encouragement to obey the law provided by the vast majority of cases where the search issues are clear. We may concede the exclusionary rule has not deterred all invasions of constitutionally protected rights by the police, nor has it been successful in encouraging all police agents to seek search warrants in the absence of emergency conditions. The lack of one hundred percent effectiveness is no more a good argument for the abolition of the rule than would be the argument that since rapes continue to occur the laws against them should be eliminated as ineffective. The proper focus on this case is on vindicating the constitutional rights of every citizen by applying the exclusionary rule when those rights are violated. It is upon the vindication of constitutional rights which attention should be focused, not on the punishment of a policeman.

To preserve our rights under the Fourth Amendment, it is important that the judicial system not endorse lawless methods to convict persons of crime, whether or not it might have seemed reasonable to the police at the time to use the unlawful methods.

IV

A "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE IN WARRANT CASES WOULD RENDER MEANINGLESS THE FOURTH AMENDMENT'S PROVISION THAT "NO WARRANTS SHALL ISSUE, BUT UPON PROBABLE CAUSE"

A. The History Of The Fourth Amendment Cautions Against Adoption Of A "Good Faith" Exception In The Warrant Situation

It was not primarily police misconduct which inspired the adoption of the Fourth Amendment. The Fourth Amendment, and particularly the warrant clause, was an outgrowth of the issuance of general warrants and writs of assistance by colonial magistrates. The authors of the Bill of Rights were especially concerned about abusive searches performed with the aid and encouragement of judicial officers, because that is the infringement of rights they had experienced. They wanted to prevent, by Constitutional guarantee, the kinds of sytematic, court-sanctioned invasions of privacy which resulted from warrants which could issue without proof of probable cause for the search.[42]

The lessons of this history should not be ignored. If America today does not suffer from the routine issuance of invalid general warrants, it is because the framers took care to protect us from that situation. Giving magistrates *carte blanche* to issue warrants, free from the threat of suppression because the *police* had acted in good faith by securing them, would sanction by implication the very abuses the Fourth Amendment was adopted to prevent.

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[42] "The purpose of the Bill of Rights was to place certain 'great rights' beyond the power of any branch of government to subvert them for the alleged good fo the people. The fourth amendment, in particular, responded to the use in the colonies of general warrants granting unrestricted powers to search. Although by 1789 such warrants had been condemned not only in the new states but also in England, the states were not satisfied with a constitution which lacked specific protection against general warrants and demanded the security of an explicit guarantee in the Bill of Rights." (Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 Journal of Criminal Law & Criminology 635, 636 (1978), fns. omitted. See generally the authorities cited in Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minnesota L. Rev. 349, 450-451, fn. 168.)

B. The Deterrence Effect Of The Exclusionary Rule Is Likely To Be Especially Great When Warrants Are Sought

As has been previously noted, the exclusionary rule encourages compliance with the Fourth Amendment by removing a primary incentive for its violation. It has, however, been suggested that the rule does not function as intended for several reasons, because the police have goals other than securing convictions (harassment, seizure of contraband, etc.) not affected by the exclusionary sanction and because, in any event, the rules governing search and seizure are so complex that even the most diligent officer is unable to apply them.

Whatever limited validity these criticisms of the exclusionary rule may have in other contexts, they are particularly inappropriate in the situation presented by the case at bench where a warrant was both sought and obtained. The seeking of a warrant in and of itself demonstrates the desire of the police to bring their case to trial. And their initiation of the warrant process involves them with legally trained individuals who can be expected, and should be required, to remedy any deficiency in the legal knowledge of the police.

If police in "stop and frisk" situations sometimes act without regard for whether evidence discovered can later be used in court, it is safe to say that police seeking a search warrant nearly always hope to develop evidence that will lead to a successful criminal prosecution. Prosecution is almost always the goal -- and therefore exclusion a meaningful sanction -- when the investigating agency seeks out a prosecutor and magistrate to obtain judicial authorization for a search.

Furthermore, any proposed exception to the exclusionary rule -- and any evaluation of its deterrent effect -- must consider more than just the role of the police officer in the warrant process. In the typical search warrant situation, a prosecutor has assisted or advised the police officer in obtaining the warrant;[43] and the warrant has been issued by a magistrate. Trained in the law, prosecutors and magistrates can be expected to

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[43] In the jurisdictions with which we are familiar, every warrant affidavit is prepared by a prosecutor. For example, in San Diego County, an officer seeking either a conventional or "telephonic" search warrant is required to contact a deputy in the District Attorney's office. Miller, *Telephonic Search Warrants: The San Diego Experience*, 9 The Prosecutor 385 (1974).

be acutely aware of, and conform their actions to, the rulings of courts on the validity of search warrants.

Thus, if there is to be a "good faith" exception to the exclusionary rule, the inquiry about "good faith" cannot stop with the officer who executed the search warrant. It must include an inquiry into the state of mind of the prosecutor, if any, who assisted in the preparation of the affidavit, and the state of mind of the issuing magistrate. Questions about whether the police or prosecutor engaged in "magistrate shopping," for example, would be relevant to their good faith.[44] Exclusion of evidence obtained under an invalid warrant will have a specific deterrent effect on the prosecutor and magistrate who participated in the issuance of that warrant.

C. The Preference Given To Warrants Is A Sufficient "Reward" For The Good Faith Of The Police In Seeking Judicial Authorization For Their Actions

Advocates of modification of the exclusionary rule suggest that the subjective good faith of the police should meet an objective standard. (See Brief of the Solicitor General, p. 57; Amicus Curiae Brief of the California Attorney General, pp. 55-62.) The proper objective standard of reasonableness, of course, is supplied by the Constitution: probable cause sufficient to support the issuance of a warrant. No change in current law is needed when an officer's and magistrate's good faith belief in the validity of the search is well founded.

The law *already* rewards the officer who seeks a warrant by making it less likely that the evidence he seizes pursuant to that warrant will be suppressed. This Court has directed that warrants be interpreted in a common sense manner and that "the resolution of doubtful or marginal cases [be] largely determined by the preference to be accorded to warrants." (*United States v. Ventresca*, 380 U.S. 102, 109 (1965)," citation omitted.)

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[44] As demonstrated above in Argument I, because the issue was not raised below, this is not a proper case to even consider a good faith exception to the exclusionary rule. There is nothing in the record about the role of the prosecutor or the good faith of the magistrate.

[45] "Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less

[Fn. 45 cont.]

Thus, the police officer who desires a successful prosecution is duly rewarded for his good faith in seeking a warrant. His basis for the search is given that most valuable of considerations, the benefit of the doubt.

No *additional* advantage should be extended. If a warrant cannot meet this minimal standard of reasonableness even after all doubts are resolved in its favor, it should not be allowed to form the justification for a search. Every invalid warrant represents an unjustified invasion of an individual's privacy, and they are not so rare that the risk can be totally discounted, even with the exclusionary rule as a sanction.

Without the exclusionary rule as a sanction, the risk of invalid warrants would be much greater. In a nation with thousands of magistrates, some inevitably will know more about Fourth Amendment guarantees than others, and be more careful in the issuance of warrants. Careful magistrates, for example, often protect citizens' rights without stifling a criminal investigation by asking the police to do further investigation before they will issue a search warrant. In the absence of the exclusionary rule, police would be encouraged to seek magistrates who knew little or nothing about Fourth Amendment law, and would issue a warrant on little more than the fact one was sought by the police. Forum shopping is a fact of life. Unless a warrant fell below the undefined standard of "objective reasonableness," the citizens of the United States would have no real protection from unconstitutional searches authorized by such uninformed magistrates.

D. No Feasible Alternative To Exclusion Exists Where There Is A Warrant

Most discussions of modifying the exclusionary rule suggest the purposes of the Fourth Amendment can be fulfilled by some alternative remedy for violations of its provisions. Suggestions for an effective alternative remedy are conspicuously absent from the briefing in this case, however. Whatever the possibility of fashioning an alternative remedy for unlawful warrantless searches, there is no prospect at all of

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[Fn. 45 cont.]

'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant,' ibid., and will sustain the judicial determination solong as 'there was substantial basis for [the magistrate] to conclude that narcotics were probably present. . . .'" (*Aguilar v. Texas*, 378 U.S. 108, 111 (1964), quoting from *Jones v. United States*, 362 U.S. 257, 271 (1960).

doing so for searches carried out pursuant to a warrant issued without probable cause.

By definition, searches which meet the standards of the proposed modification to the exclusionary rule are carried out in good faith. Under existing law, the subjects of such a search cannot civilly sue the agents who performed the search. The magistrate who authorized the unlawful search would presumably also have acted in good faith, and would certainly enjoy judicial immunity from civil suit. So even if a fair special tribunal could be found to hear civil search cases, and the financially strapped federal and state governments could be expected to appropriate substantial sums to pay judgments for unlawful searches -- two highly questionable assumptions -- the person whose person, home, automobile or effects were unlawfully searched pursuant to an invalid warrant would have no access to that tribunal.

Nor is there any hope of an effective internal disciplinary system which would prevent searches under warrants issued without probable cause. No police department could be expected to have a rule which provided for some cross-check of the validity of warrants and ordered its officers not to execute warrants which fell short under that procedure, whatever it might be.

Magistrates, who are in state systems often independently appointed or elected judges, are simply not subject to day-to-day internal supervision. A particular magistrate who repeatedly authorized outrageous searches might eventually be removed by the appointing power or defeated in an election, but only constant and extreme violations of the Fourth Amendment would be likely to be cause for removal from office.[46] Even then, the crucial question would most likely be the political power of the targets of the outrageous searches, not the seriousness of the constitutional violations themselves. Removal from office would not and should not be the sanction for the occasional issuance of a search warrant which fails constitutional standards. But removal is the only possible internal sanction, and it demonstrates the futility of attempting to regulate magistrates by internal discipline, because they are not and cannot be subject to such discipline.

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[46] It is the routine violations of the Fourth Amendment, rather than the exceptional incidents which generate public outcry, which most require the exclusionary sanction. Shocking or violent intrusions can perhaps be curtailed by civil or criminal actions against the offending party, prevention of the less egregious violations must depend on exclusion of the evidence thus obtained. (Kamisar, *A Defense of the Exclusionary Rule*, 15 Crim. L. Bull. 5, 32-34 (1979).

Where a search is conducted pursuant to an unlawful warrant the exclusionary rule is not only the sole meaningful remedy, it is the only remedy. The Constitution prohibits the issuance of search warrants without probable cause. This Court has the difficult task of making that provision meaningful, and has chosen the exclusionary rule, which though not specified in the Constitution, is a natural outgrowth of it. That rule is the only feasible way to make the Constitution a living document instead of a dead letter.

CONCLUSION

No reevaluation of the exclusionary rule can properly ignore the history of the rule. Integral to that history is its place in protecting the rights of privacy of our citizens and vindicating Fourth Amendment rights, as well as encouraging lawful conduct by the police. Although as previously argued the deterrent effect of the exclusionary rule is supported by experience and common sense, it need not stand on that basis alone. As 1984 draws near, it is to this Court that our citizens look to "resist every encroachment upon rights expressly stipulated for in the Constitution." (James Madison, Annals of Congress 439 (1789).)

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No. 81-430

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ILLINOIS,

Petitioner,

vs.

LANCE GATES AND SUSAN GATES,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ILLINOIS

BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether this Court should adopt an exception to the Fourth Amendment Exclusionary Rule that will permit the admissibility of evidence where the police act in an objective good faith belief that their conduct is proper.

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OF THE STATE OF ILLINOIS

BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Tyrone C. Fahner, Attorney General, State of Illinois, Counsel for Petitioner, and James W. Reilley, Esq., Counsel for Respondents. Letters of Consent of the parties have been filed with the Clerk of this Court.

INTEREST OF AMICUS

The NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., is a non-profit corporation and the sole national organization representing state and local prosecuting attorneys in America. Its programs of education, training, publications

and *amicus curiae* activity carry out its guiding purpose since its founding in 1950 of reforming the criminal justice system for the benefit of all our citizens.

The prosecutors of this nation are fully conversant with the problems faced by police officers in their good faith attempts to conduct criminal investigations and gather evidence by using investigative procedures that comply with the myriad of rules and exceptions that have been judicially engrafted upon the Fourth Amendment. It was noted by the Chairman of our Board of Directors, David L. Armstrong, Commonwealth Attorney, Jefferson County, Louisville, Kentucky, former President of NDAA, in his testimony before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate, on April 20, 1982, on the federal Exclusionary Rule reform bills (S. 101, S. 751), that it – the *prosecutor* upon whom the heaviest burden of the Rule rests. The prosecutor must not only act as a guide for the police in tracing their way through this maze of rules, but must shoulder the responsibility for unsuccessful prosecution when a trial or appellate court suppresses vital and reliable evidence. It is our belief that the price our Society pays for continuation of the Rule in its absolute form can no longer be justified.

STATEMENT

In its opinion in *People* v. *Gates,* 85 Ill. 2d 376, 423 N. E. 2d 887 (1981), the Supreme Court of Illinois held that an anonymous letter received by the police concerning alleged criminal activity did not satisfy the two-prong test for probable cause enunciated in *Aguilar* v. *Texas,* 378 U. S. 108 (1964). By order of November 29, 1982 restoring this case to the calendar for reargument, the United States Supreme Court has invited the parties, and, in effect, the several *amici* who are keenly interested in the issue, to "... address the question whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, *Mapp* v. *Ohio,*

367 U. S. 643 (1961); *Weeks* v. *United States*, 232 U. S. 383 (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment." *Amicus* addresses that issue from the perspective of the prosecuting attorney. At the same time *amicus* wishes to state that it is in accord with the arguments made by the State of Illinois and other *amici* who have pointed out to this Court in their briefs the need for adoption of the good faith exception to the Exclusionary Rule, such as Americans for Effective Law Enforcement, Inc., the International Association of Chiefs of Police, Inc., and the individual members of the Attorney General's Task Force on Violent Crime.

SUMMARY OF ARGUMENT

The application of the Fourth Amendment Exclusionary Rule in cases where the police have acted in objective good faith no longer serves the purposes for which the Rule was originally intended. We ask this Court to adopt a good faith exception to the Rule not only in cases where a search warrant has been issued by an impartial magistrate, as in the instant case, but in *all* appropriate cases where the police have acted in the objective good faith belief that their conduct conformed to the requirements of the Fourth Amendment.

ARGUMENT

IF THIS COURT FINDS THAT THE EVIDENCE IN THIS CASE WAS OBTAINED IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS, IT SHOULD APPLY AN EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE THAT WOULD PERMIT THE ADMISSIBILITY OF EVIDENCE WHERE THE POLICE HAVE ACTED IN AN OBJECTIVE GOOD FAITH BELIEF THAT THEIR CONDUCT WAS PROPER.

Amicus will not repeat here the arguments of other *amici* concerning the history, purposes, and failure of the Exclusionary Rule in our system of criminal justice. The list of commentators who have catalogued the shortcomings of the Rule is impressive in itself. *See, e.g.,* National Prosecution Standards, Standard 19.11 and Commentary, *Exclusionary Rule,* p. 356, National District Attorneys Association (1977); Miller, *The Exclusionary Rule and Its Alternatives,* 12 The Prosecutor 335 (1977); Van de Kamp, *The Exclusionary Rule: Promises Not Kept—Proposed Alternatives,* 15 The Prosecutor 348 (1981); *The Emerging Good Faith Exception to the Exclusionary Rule,* 57 Notre Dame Lawyer 112 (1981); Kaplan, *The Limits of the Exclusionary Rule,* 26 Stanford Law Rev. 1027 (1974); Schrock and Welsh, *Up From Calandra: The Exclusionary Rule,* 59 Minn. Law Rev. 251 (1974); Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule,* 69 Georgetown Law Journal 1361 (1981).

There is probably no better description of the Rule's basic defect and its remedy than the recommendation of the Attorney General's Task Force on Violent Crime in its Final Report of August 17, 1981:

> The fundamental and legitimate purpose of the exclusionary rule—to deter illegal police conduct and promote respect for the rule of law by preventing illegally

> obtained evidence from being used in a criminal trial—has been eroded by the action of the courts barring evidence of the truth, however important, if there is any investigative error, however unintended or trivial. We believe that any remedy for the violation of a constitutional right should be proportional to the magnitude of the violation. In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the **reasonable, good faith belief** that it was in conformity to the Fourth Amendment to the Constitution. **A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a good faith belief.**

Attorney General's Task Force on Violent Crime, 29 CrL 3131, 3134 (1981) (emphasis supplied).

Although NDAA previously recommended outright abolition of the Rule, see National Prosecutor Standards, *supra,* Standard 19.11, *Exclusionary Rule,* we adopted the Attorney General's Task Force recommendations at our Board of Directors meeting on October 8, 1981, as a reasonable alternative that will at this time effectively address the proper concerns of all participants in the criminal justice system. We do not believe, however, that this Court should limit the application of such an exception to warrant cases only, and we have supported both state and federal legislation that would provide for a general good faith exception, or provide statutory remedies as an alternative. Statement of David L. Armstrong, former President, NDAA, before Subcommittee on Criminal Law, Committee on the Judiciary, United States Senate, on April 20, 1982.

In this regard we believe that the recently enacted Colorado statute, Colo. Rev. Stat. § 16-3-308 (1981), written by former Denver District Attorney Dale Tooley, and the Arizona statute, Ariz. Rev. Stat., § 13-3925 (1982), serve as examples for the states because they will focus upon the good faith exception as an objective standard, rather than simply relying

upon the subjective beliefs of a police officer that his conduct conforms to the Fourth Amendment. We note also the recent promulgation of a Model State Statute on Exclusionary Rule Limitations by Americans for Effective Law Enforcement, Inc. We anticipate that the Model State Statute will be relied upon by many states in drafting their statutes in this area, and it also utilizes an objective standard. See Appendix.

Although statutory reform at the state and federal levels is highly desireable, recent caselaw development has been the primary vehicle for reform of the Exclusionary Rule, and we support this development as well. The seminal case in the adoption of the good faith exception by the courts is *United States* v. *Williams*, 622 F. 2d 830 (5th Cir.), *cert. den.*, 101 S. Ct. 946 (1981), where the Fifth Circuit Court of Appeals, sitting *en banc*, stated:

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the Exclusionary Rule to the evidence.

622 F. 2d 830, 846-7.

In devising this new approach, the *Williams* Court noted that the officer's subjective belief concerning the legality of a search would not suffice. Ignorance of the basic principles of criminal procedure would not constitute good faith. The police officer's actions are subject to an objective test and must be "based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe he was acting lawfully." 622 F. 2d at 847.

The *Williams* Court also put to rest the argument that the Exclusionary Rule deters police misconduct in all circumstances: "It makes no sense to speak of deterring police officers

who acted in the good-faith belief that their conduct was legal by suppressing evidence derived from such actions unless we somehow wish to deter them from acting at all." 622 F. 2d at 842. The court stated that the Rule should apply only when that application can serve its originally intended purpose, i.e., deterrence. 622 F. 2d at 847.

The growing dissatisfaction with the absolute application of the Exclusionary Rule has prompted several other courts to recognize a good faith exception to the Rule. *See, e.g., United States* v. *Ajlouny,* 629 F. 2d 830, 840-42 (2d Cir. 1980), *cert. den.,* 449 U. S. 1111 (1981) (good-faith mistake of law); *Nix* v. *State,* 621 P. 2d 1347, 1349-50 (Alas. 1981) (consent to search; good-faith mistake of fact); *Richmond* v. *Commonwealth,* 28 K. L. S. 10, 29 Cr L 2529 (Ky. App. 1981), *aff'd.,* 29 K. L. S. 10 (Ky. 1982) (mistake of law); *People* v. *Adams,* 53 N. Y. 2d 1, 442 N. E. 2d 537 (1981) (exigency; mistake of fact); *Commonwealth* v. *Bradshaw,* 434 A. 2d 181, 183 (Pa. 1981) (good-faith but mistaken belief in informant's information). In each of these cases, the courts wisely applied the principle that "[w]here the reason for the rule ceases, its application must cease also." *United States* v. *Williams,* 622 F. 2d at 840; *see,* Attorney General's Task Force on Violent Crime, *supra,* at 3134 (1981).

In *People* v. *Adams, supra,* the New York Court of Appeals applied the good-faith exception to a consent to search situation where the consenting party was not a lawful resident of the premises searched by the police. On the applicability of the Rule to this specific situation, the Court of Appeals stated:

> A further, although somewhat related, consideration behind this line of reasoning involves the very purpose of the exclusionary rule ... Because the exclusionary rule is primarily aimed at deterring police misconduct, these courts have recognized that its purpose would not be furthered by applying it in instances where the police, believing that they are acting lawfully, engage in a search

> which later turns out to be "unlawful" because, in hindsight, their reasonable reliance on the consenting person's authority proves to be erroneous.

442 N. E. 2d 537, 541.

And, in *Richmond* v. *Commonwealth, supra,* the Kentucky Court of Appeals refused to suppress drugs whose seizure, while perhaps technically illegal, was accomplished by police officers acting reasonably and in complete good faith. The evidence was seized pursuant to a warrant issued by a magistrate from another jurisdiction. The court stated: "We simply hold here, limited to the facts of this case, that the application of the exclusionary rule, even if the search warrant was illegal, would do nothing to deter future police conduct taken in the reasonable and good faith belief that the conduct was legal." 28 K. L. S. at 17; 29 CrL at 2529.[1]

As the Supreme Court of Louisiana stated in *State* v. *Lehnen,* 403 So. 2d 683, 686 (La. 1981):

> The exclusion of reliable evidence is too high a price to pay unless exclusion is essential to deter deliberate violations of constitutional rights. Further, this approach is in accordance with the growing recognition that the exclusionary rule has limited efficacy as a deterrent in situations in which officers have acted in good faith. See *United States* v. *Williams,* 622 F. 2d 830, 27 Cr. L. 3293 (5th Cir. 1980).
> * * *

These cases, of the many that have now recognized some form of the good faith exception, highlight the many expressions of concern with the Rule and its inadequacies, while exacting a high price in terminated prosecutions and further

[1] The Supreme Court of Kentucky affirmed on other grounds at 29 K. L. S. 10 (Ky. 1982), taking the position that magistrates have statewide jurisdiction to issue search warrants under the Kentucky Constitution.

victimization of our innocent, law-abiding citizens.[2] As noted by former Los Angeles, California, District Attorney, John K. Van de Kamp, now California Attorney General:

> The rule is not only a legal issue—it is an emotional one as well. There are those to whom the exclusionary rule stands as a symbol of our commitment to protect the citizens of this country against overreach and abuse by law enforcement officers. On the other hand, there are many people to whom the exclusionary rule symbolizes the manner in which attorneys and the courts have allowed technicalities to triumph over the search for truth. More recently, as the public's interest in the criminal justice system has grown, an increasing number of persons have expressed their disenchantment with the rule.
>
> *It is, therefore, an appropriate time to take another look at the exclusionary rule in the cold light of day and see how it has actually worked out in practice since 1914.*
>
> A review of the rule's application and development leads to the following conclusions:
>
> • It has failed to live up to the expectations of those who framed it.
>
> • Despite the dramatic improvement in police professionalism, the rule itself is of questionable effectiveness in deterring instances of improper police conduct.

---

[2] *Amicus* notes with interest the study of the National Institute of Justice released on December 17, 1982, indicating that one out of every three persons arrested in Los Angeles, California, on felony drug charges, were not brought to trial because the police committed errors in seizing evidence, and that approximately half of the defendants released in that State because of the Exclusionary Rule were arrested within two years for new offenses. Bosarge, *NIJ Study Finds Exclusionary Rule Has Major Negative Impact on Prosecuting Drug Cases,* 16 Crime Control Digest, No. 52, p. 1 (1982). *Amicus* submits that the statistics cited in the NIJ report amply justify concern with an application of the Rule that fails to recognize an exception for police officers acting in objective good faith.

> • The statutory rules and case law governing search and seizure have become so complex and change so frequently that no law enforcement officer can be reasonably expected to know them in their entirety. This is also true of the rules governing arrest, confessions, line-ups and other areas of police procedure where the exclusionary rule comes into play.
>
> • As a consequence of its implementation, truthful, reliable and probative evidence is kept from the trier of fact in criminal cases. As a result, guilty persons sometimes go free. On occasion, cases are so weakened by the loss of the excluded evidence that a conviction—if it can be obtained at all—can only be obtained on charges less substantial than those for which a defendant is guilty in fact.

Van de Kamp, *The Exclusionary Rule: Promises Not Kept—Proposed Alternatives,* 15 The Prosecutor 348 (1981) (emphasis supplied).

Amicus submits that application of the Exclusionary Rule in cases such as the instant case, where the police have acted in objective good faith, serves no good purpose whatsoever. It is, indeed, time for a change, as the many *amici* supporting the State of Illinois in this case have urged. Although prosecutors have been in the vanguard of state and federal legislative and judicial reform of the Rule, we must look to the United States Supreme Court for a final answer to this issue. The prosecutors of this nation know that this Honorable Court will give this matter—which is probably the most important criminal justice issue of the 20th Century—careful and balanced consideration.

CONCLUSION

Amicus submits that the Exclusionary Rule should not be applied in this case. This case presents a timely and appropriate opportunity for the Court to adopt an objective good faith exception to the Exclusionary Rule. We ask that the decision of the Supreme Court of Illinois be reversed on the facts and law, and on the basis of sound judicial policy.

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APPENDIX

AELE MODEL STATE STATUTE*

Exclusionary Rule Limitations: Admissibility of evidence obtained as a result of an unlawful search or seizure.

A. If a party in a proceeding, whether civil or criminal, seeks to exclude evidence from the trier of fact because of the conduct of a peace officer in obtaining the evidence, the proponent of the evidence may urge that the peace officer's conduct was taken in a reasonable, good faith belief that the conduct was proper and that the evidence discovered should not be kept from the trier of fact if otherwise admissible.

B. No court shall suppress evidence which is otherwise admissible in a civil or criminal proceeding if the evidence was seized in good faith or as a result of a technical violation.

C. "Evidence" means contraband, instrumentalities or fruits of a crime, or any other evidence which tends to prove a fact in issue.

D. "Good faith" means whenever a peace officer obtains evidence:
   1. Pursuant to a search warrant obtained from a neutral and detached magistrate, which warrant is free from obvious defects other than non-deliberate errors in preparation and the officer reasonably believed the warrant to be valid; or
   2. Pursuant to a warrantless search, when:
      a. The officer reasonably believed he possessed probable cause to make the search, and
      b. The officer, possessed at least a reasonable suspicion that the person or premises searched, possessed or contained items of an evidentiary nature, and
      c. The officer reasonably believed there were circumstances excusing the procurement of a search warrant; or
   3. Pursuant to a search resulting from an arrest, when:
      a. The officer reasonably believed he possessed probable cause to make the arrest, and
      b. The officer reasonably believed there were circumstances excusing the procurement of an arrest warrant, or
      c. The officer procured or executed an invalid arrest warrant he reasonably believed to be valid; or

4. Pursuant to a statute, local ordinance, judicial precedent or court rule which is later declared unconstitutional or otherwise invalidated; and
5. The officer has completed a law enforcement academy or other approved prerequisite curriculum and any mandatory subsequent training or instruction in Constitutional law and criminal procedure, where required by the [State Peace Officers' Standards and Training Commission].

E. This section shall not adversely affect the rights of any plaintiff to seek special damages against a peace officer or a governmental entity, provided that the trier of fact in such civil action determines that the officer or entity conducted an unlawful search or seizure.

F. [Appropriate savings and severability clause].

*Adopted by **Americans for Effective Law Enforcement, Inc.** July 14, 1982.

Amicus Brief

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...e Supreme Court, U.S.
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No. 81-430

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

STATE OF ILLINOIS, - - - - Petitioner,

vs.

LANCE GATES AND SUSAN GATES, - Respondents.

—On Re-Argument—
On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AMICUS CURIAE

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INTEREST OF AMICUS

(1) The National Legal Aid and Defender Association [NLADA] is a not-for-profit organization whose members include the great majority of public defender offices, co-ordinated assigned counsel systems and legal services agencies in the nation. The organization also includes two thousand individual members, most of whom are private practitioners.

NLADA's primary purpose is to assist in providing effective legal services to persons unable to retain counsel. In carrying out this purpose, NLADA has a strong interest in protecting its members' clients' constitutional rights, particularly from violation by police, and in assuring full access to the courts for trial and appellate level litigation concerning those rights.

(2) NLADA joins respondents in opposing any modification of the exclusionary rule.

(3) NLADA has received the written consent of both parties for the filing of this brief.

SUMMARY OF ARGUMENT

The exclusionary rule in its present form is the sole means of effectively furthering the policy values underlying the Fourth Amendment. It was preceded by widespread police illegality, and it has resulted in extensive improvement in police practices at minimal evidentiary cost and on the basis of objective criteria. Fourth Amendment jurisprudence already takes into account an officer's reasonable mistakes of facts and accords great deference to a magistrate's decision to issue a warrant.

A "reasonable belief" or "good faith" exception to the exclusionary rule would undermine the Warrant Clause, erode protection of Fourth Amendment rights, especially of minorities, halt substantive development of Fourth Amendment law, encourage police ignorance and be administratively unfeasible; it would ultimately leave people "secure . . . only in the discretion of the police."

In the past ten years this Court has significantly narrowed the scope of application of the rule, and no further modification is warranted.

ARGUMENT

A "Reasonable Belief" Exception to the Exclusionary Rule Would Undermine the Warrant Clause, Erode Protection of Fourth Amendment Rights, Especially of Minorities, Halt Substantive Development of Fourth Amendment Law, Encourage Police Ignorance and be Administratively Unfeasible, and it Should be Rejected.

> The history of American freedom is, in no small measure, the history of procedure. *Malinski* v. *New York*, 324 U. S. 401, 414, 64 S. Ct. 781, 89 L. Ed. 1029, 1037 (1945), Frankfurter, J., concurring.

Introduction

A "reasonable belief" or "good faith" exception to the exclusionary rule would respond to the frustrations of police officers who execute unconstitutional warrants or err in determining whether they have sufficient information to justify an arrest or stop or excuse the issuance of a warrant. In doing so, however, such a rule would turn the Fourth Amendment upside down. It would place the police above the law and unleash forces that would, in the end, leave people "secure . . . only in the discretion of the police."

The Fourth Amendment is the fundamental provision by which the privacy rights of homeowners and drifters, native-born citizens and immigrants, conformists and dissidents, law-abiding citizens and criminals are protected under our constitutional scheme. These rights are among our most cherished, yet they are among "the most difficult to protect [, for] officers themselves are the chief invaders, there is no enforcement outside of court[,]" and, unlike some other constitutional rights, "there is no way in which the innocent citizen can invoke advance protection." *Brinegar* v. *United States*, 338 U. S. 160, 181-182, 69 S. Ct. 1302, 92 L. Ed. 1879, 1893-1894 (1949), Jackson, J., dissenting.

Moreover, the values of the Fourth Amendment are seemingly remote and its benefits largely abstract and unseen—the unlawful stop or raid of a home that is *not* made, the unfounded warrant that is *not* issued—while the costs of enforcing its mandates are concrete and visible—the suppression today of actual evidence. In times of great frustration about crime this apparent anomaly leaves the Amendment, its values and the rules by which it is enforced vulnerable targets for criticism, yet it is in times such as these that the Amendment and these rules must be most vigorously protected.

In *Weeks* v. *United States,* 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914), this Court unanimously held that the values underlying the Fourth Amendment could only be adequately protected by excluding from evidence in federal court materials obtained unconstitutionally by federal officers. In so ruling, this Court stressed that without an exclusionary rule "the protection of the Fourth Amendment . . . is of no value, and . . . might as well be stricken from the Constitution." 232 U. S. at 393, 58 L. Ed. at 656.

These words were reiterated in *Elkins* v. *United States,* 364 U. S. 206, 209-210, 80 S. Ct. 1437, 4 L. Ed. 2d 1669, 1673 (1960), and echoed again in *Mapp* v. *Ohio,* 367 U. S. 643, 648, 660, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 1086, 1093 (1961), where this Court held that the exclusionary rule is "a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words' [,] . . . an empty promise."[1]

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[1]While *Mapp* and *Wolf* v. *Colorado,* 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949), were both decided by a closely divided Court, in each case opponents of applying the exclusionary rule to the states based their positions *not* on opposition to the rule

(Footnote continued on following page)

The Values and Purposes of the Fourth Amendment

Recent decisions of this Court have focused on deterrence of unlawful police conduct as the primary justification for the exclusionary rule, downplaying the value of other considerations. Cf., e.g., *Stone* v. *Powell,* 428 U. S. 465, 482-486, 491-493, 96 S. Ct. 3037, 49 L. Ed. 2d 1067, 1081-1083, 1086-1087 (1976). Deterrence was not even discussed as a basis for the rule until *Elkins,* however, and it is clear that the rule furthers at least four other vital goals as well:

First, the exclusionary rule upholds "the imperative of judicial integrity" in litigation involving Fourth Amendment rights, for, as the Court stressed in *Elkins,* 364 U. S. at 223, 4 L. Ed. 2d at 1680, citing Holmes, J., dissenting in *Olmstead* v. *United States,* 277 U. S. 436, 470, 48 S. Ct. 564, 72 L. Ed. 944, 953 (1928), " 'no distinction can be taken between the Government as prosecutor and the Government as judge;' "

Second, as this Court pointed out in *Terry* v. *Ohio,* 392 U. S. 1, 12, 88 S. Ct. 1868, 20 L. Ed. 2d 889, 901 (1968), the rule is the sole judicial means by which these rights may effectively be protected:

> . . . *experience has taught that it* [*the exclusionary rule*] *is the only effective deterrent to police misconduct in the criminal context,* and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words." (emphasis added)

(Footnote continued from preceding page)
itself, but on considerations of federalism. It is only recently that any member of this Court has expressed opposition to the rule itself.

Third, the exclusionary rule plays a critical role in the development of substantive Fourth Amendment law. Mertens and Wasserstrom illustrate this point in "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," 70 Geo. L. J. 365, 404, 405-406 (1981):

> By functioning as the primary mechanism through which the courts develop and articulate the limits of the Fourth Amendment itself, the exclusionary rule plays an indispensable role in preventing Fourth Amendment violations . . . even when a court declines to suppress evidence.

Fourth, the exclusionary rule serves as an overriding symbol of our society's commitment to the primacy of law over the raw power of government and its agents "engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14, 68 S. Ct. 367, 92 L. Ed. 436, 440 (1948). Indeed, to many observers, "[T]he symbolic value of the exclusionary rule is perhaps its most immeasurable aspect." Geller, "Is the Evidence in on the Exclusionary Rule?" 67 ABA J. 1642, 1645 (1981).

The Fourth Amendment exists not to assist the police or relieve their disappointments but to limit their conduct and that of magistrates. Officers' beliefs as to the legality of their actions are irrelevant. This Court has emphasized in two major Fourth Amendment decisions that

> . . . good faith on the part of the arresting officers is not enough. *Henry* v. *United States*, 361 U. S. 98, 102, 80 S. Ct. 168, 4 L. Ed. 2d 134, 138 (1959)
>
> We may assume that the arresting officers acted in good faith in arresting the petitioner. But "good faith

> on the part of the arresting officers is not enough." . . . [citing *Henry, supra*] If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects" only in the discretion of the police. *Beck* v. *Ohio*, 379 U. S. 89, 98, 85 S. Ct. 223, 13 L. Ed. 2d 142, 148 (1964)

This axiom was recently reaffirmed in *Delaware* v. *Prouse*, 440 U. S. 648, 654, 99 S. Ct. 1391, 59 L. Ed. 2d 660, 668 (1979), when Justice White stressed in his opinion for the Court that "the reasonableness test usually requires, at a minimum, that *the facts upon which an intrusion is based be capable of measurement against 'an objective standard.'*" (emphasis added)

Protection of Fourth Amendment rights is a difficult process under the best of circumstances, but this Court recognized as long ago as *Weeks, supra*, that law enforcement in this country too often does not operate within the law. There is a "tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions." 232 U. S. at 392, 58 L. Ed. at 655. Justice Jackson stressed the breadth of police illegality in his dissenting opinion in *Brinegar, supra*, 338 U. S. at 181, 92 L. Ed. at 1893, cited with approval in *Elkins, supra*, 364 U. S. at 217-218, 4 L. Ed. 2d at 1677-1678:

> *Only occasional and more flagrant abuses come to the attention of the court . . . There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.* (emphasis added)

A "Good Faith or "Reasonable Belief" Test Is Inherently Subjective and Would Undermine Fourth Amendment Rights.

A "good faith" or "reasonable belief" standard in applying the exclusionary rule would be subjective under any definition. While some proponents of the exception argue that subjectivity could be avoided by requiring that an officer's personal belief be "objectively reasonable" as well, cf., e.g., Brief *Amici Curiae* Seven Former Members of the Attorney General's Task Force, *et al.*, at 21-22, objectivity cannot be provided by reference to a "reasonable officer's" mistaken belief as to the law. Allowing an officer's beliefs as to the law to carry weight under *any* circumstances is precisely what makes the rule subjective. Rather than eliminating subjectivity, inclusion of a "reasonableness" element in the test merely adds a second layer of it. Emphatically rejecting the concept of "good faith" or "reasonable belief," Professor LaFave recently wrote:

> . . . *it is nothing short of nonsense to talk of a reasonable belief that there is probable cause,* for the probable cause standard itself takes into account reasonable mistakes of fact.[2] If mistakes of law were also to be taken into account, then the law becomes whatever the officer thinks it is. LaFave letter, Hearings on the "Exclusionary Rule Bills," 97th Congress, 1st and 2nd Sessions, Senate Judiciary Committee, Subcommittee on Criminal Law [hereinafter Hearings] (1982) at 793-794 (emphasis added)

In cases involving warrants, a "good faith" exception to the exclusionary rule would virtually destroy the Warrant Clause. Warrants are usually issued *ex parte* and generally after at best perfunctory scrutiny. They may be, and in some states often are, issued by clerks or part-time

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[2]See discussion, *infra*, pp. 9-10.

magistrates untrained in the law. Cf., e.g., *Shadwick* v. *City of Tampa*, 407 U. S. 345, 92 S. Ct. 2119, 32 L. Ed. 2d 783 (1972). Further, the Warrant Clause, by its language, is directed at protecting against unlawful or abusive *issuance* of a warrant. Cf., e.g., *Weeks, supra*, 232 U. S. at 394, 58 L. Ed. at 656. For these reasons, full judicial review of decisions to issue warrants is essential to the viability of the Warrant Clause. If a "good faith" exception were adopted in such cases, effective review, judicial self-policing and access of litigants to the courts for protection of Fourth Amendment rights in criminal cases would all be severely curtailed.

If an officer's subjective "good faith" were to become the standard, the scope of review would be so narrow that only in cases of perjury or reckless submission of an affidavit could courts assure the "essential" "detached judgment of a neutral magistrate . . ." *Gerstein* v. *Pugh*, 420 U. S. 103, 114, 95 S. Ct. 854, 43 L. Ed. 2d 54, 65 (1975). There would be no effective way to determine that a warrant was issued by a person "sever[ed] . . . from activities of law enforcement," *Shadwick* v. *City of Tampa, supra*, 407 U. S. at 350, 32 L. Ed. 2d at 789; *Coolidge* v. *New Hampshire*, 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), or was based on probable cause, or "particularly describ[ed] the place to be searched, and the persons or things to be seized." Further, even if such a determination were made in some cases, it would be unenforceable and, therefore, of no value.

Justice Powell's opinion for the Court in *United States* v. *United States District Court*, 407 U. S. 297, 315-316, 92 S. Ct. 2125, 32 L. Ed. 2d 752, 765 (1972), illuminates why police good intentions have no place in evaluating claims of violation of the Warrant Clause:

> *The warrant clause* of the Fourth Amendment is not dead language. Rather, it has been "a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It *is not an inconvenience to be somehow 'weighed' against the claims of police efficiency.* It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement." (cite omitted; emphasis added)

Because it would be extremely rare that an officer was not "well-intentioned" as to the propriety of a warrant, under a "good faith" exception the Warrant Clause, the "bulwark of Fourth Amendment protection," *Franks* v. *Delaware,* 438 U. S. 154, 164, 98 S. Ct. 2674, 57 L. Ed. 2d 667, 677 (1978), would become "dead language."

Further, if a primary justification for a "good faith" exception is to account for an officer's need to make split-second decisions in rapidly unfolding encounters, cf., e.g., Supplemental Brief for the United States as *Amicus Curiae* at 28-29; *United States* v. *Williams,* 622 F. 2d 830, 842 (5th Cir. 1980) (*en banc*), concurring opinion, this consideration argues *against* adoption of such an exception in cases where, because a warrant has been obtained, there clearly was no need for instantaneous action.

In either a warrant case or a warrantless case, a "reasonable belief" or "good faith" exception would also be an abdication of the judiciary's constitutional duty, for it would effectively give the police a voice in the probable cause determination. It is, however, the responsibility of the courts to determine the legality of police conduct. Justice Powell emphasized this point as well in *Gerstein* v.

Pugh, supra, 420 U. S. at 112-113, 43 L. Ed. 2d at 64, citing *Johnson* v. *United States, supra,* 333 U. S. at 13-14, 92 L. Ed. 2d at 440:

> "The point of the *Fourth Amendment,* which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its *protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.*" (emphasis added)

By condoning objectively unreasonable conduct based on asserted "good faith," such an exception would also create the anomaly of a "reasonable unreasonable search."

Current Fourth Amendment law is also already flexible in taking into account an officer's objectively reasonable mistakes of *fact*: An officer's belief that certain facts exist will, if the facts would be sufficient to create probable cause, uphold a search or seizure whether or not the facts later turn out to have existed, so long as the belief was *objectively* reasonable at the time. *Beck* v. *Ohio, supra; Henry* v. *United States, supra; Delaware* v. *Prouse, supra,* 440 U. S. at 654-655, 59 L. Ed. 2d at 668.[3] Hearsay and rumor, if properly supported, may be relied upon in order to establish probable cause, cf., e.g., *Spinelli* v. *United States,* 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar* v. *Texas,* 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 623 (1964); *Draper* v. *United States,* 358 U. S. 307, 79

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[3] *Hill* v. *California,* 401 U. S. 797, 91 S. Ct. 1106, 28 L. Ed. 2d 484 (1971), relied on by both Petitioner, Brief at 22, and the United States, Supplemental Brief at 34-35, is an example of a reasonable mistake of *fact* and provides no support to the argument for a "good faith" exception for mistakes of *law.*

S. Ct. 329, 3 L. Ed. 2d 327 (1959), and an officer receives the benefit of the doubt when he or she has been required to make a quick factual judgment. *Warden* v. *Hayden*, 387 U. S. 294, 298-299, 87 S. Ct. 1642, 18 L. Ed. 2d 782, 787 (1967). When acting on the basis of their experience, police may also even attach significance to circumstances that would appear innocuous to a lay person. *United States* v. *Cortez*, 449 U. S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621, 629 (1981).

Where a search warrant has been obtained, great deference is accorded a magistrate's determination of probable cause, and "the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *United States* v. *Ventresca*, 380 U. S. 102, 109, 85 S. Ct. 741, 13 L. Ed. 2d 684, 689 (1965). In practice, a warrant is invalidated only if the magistrate's judgment was "arbitrarily exercised." Cf., e.g., *United States* v. *Giacalone*, 541 F. 2d 508, 513 (6th Cir. 1976) (*en banc*).

The irrelevance of an officer's subjective intent is also reflected in cases declining to invalidate an arrest based objectively on probable cause but for a subjectively invalid reason. As this Court recognized in *Scott* v. *United States*, 436 U. S. 128, 138, 98 S. Ct. 1717, 56 L. Ed. 2d 168, 178 (1978):

> *. . . the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.* (emphasis added)[4]

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[4]Elsewhere in *Scott*, Justice Rehnquist suggests in *dictum* that while an officer's intent is irrelevant to the determination of

(Footnote continued on following page)

Justice White also addressed the irrelevance of subjective bad faith in his opinion dissenting from the dismissal of *certiorari* in *Massachusetts* v. *Painten*, 389 U. S. 560, 565, 88 S. Ct. 660, 19 L. Ed. 2d 770, 773 (1968):

> . . . sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.

These observations illustrate that the balance between individual rights and the power of government depends not on an officer's subjective intent in a given case but on the balance of rights struck in the Constitution. Cf., *Dunaway* v. *New York*, 442 U. S. 200, 213-215, 99 S. Ct. 2248, 60 L. Ed. 2d 824, 836-837 (1979).

The Deterrent Impact of the Exclusionary Rule

Arguments in favor of a "good faith" exception mistakenly consider only individual deterrence. Criminal trials are not private actions, however, and as Professor LaFave stressed in his Senate testimony, "exclusion is not a sanction to which the officer is personally subjected, but rather is a sanction that is imposed upon the system." Hearings at 328. Justice Stevens explained the point in his concurring opinion in *Dunaway, supra*, 442 U. S. at 221, 60 L. Ed. 2d at 841:

> The justification for the exclusion of evidence obtained by improper methods is to motivate the law enforcement profession as a whole—not the aberrant indi-

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(Footnote continued from preceding page)
whether there has been a substantive violation, it may be material to the decision of whether to suppress the fruits of that violation. 436 U. S. at 135-136, 56 L. Ed. 2d at 176-177. This distinction is inconsistent with the constitutional foundations of the exclusionary rule, however, and it fails properly to consider the broader values served by the Amendment and the rule. See pp. 3-5, *supra*.

> vidual officer—to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional rights. For that reason, exclusionary rules should embody objective criteria rather than subjective considerations.

Deterrence may be either individual or general, and while the former is admittedly difficult to quantify,[5] solely to focus on this point misses the forest for the trees. It is on a larger scale that the deterrent value of the exclusionary rule is most significant.

However imprecise the rule's impact may be in individual cases, it is nevertheless real. Professor Loewenthal concluded after "countless" interviews with and observations of New York City police officers from 1971 to 1974 and again between 1976 and 1978 that

> there is substantial evidence that the police themselves would not respect courts which did not support constitutional standards by excluding any evidence which was unconstitutionally obtained. Loewenthal, "Evaluating the Exclusionary Rule in Search and Seizure," 49 UMKC L. Rev. 24, 29 (1980)

Beyond individual case deterrence, plainly visible systemic deterrence is illustrated, in part, by the existence of extensive, high-quality police training programs in constitutional rights that did not exist prior to *Mapp*.

Maryland Attorney General Stephen H. Sachs, previously United States Attorney for the District of Maryland, recently underscored the relationship between the exclusionary rule and police training during testimony before

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[5]See, e.g., Mertens and Wasserstrom, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," 70 Geo. L. J. 365, 389-390 (1981) and studies cited therein.

the Senate Judiciary Committee's Subcommittee on Criminal Law:

> In my state, *Mapp* has been responsible for a virtual explosion in the amount and quality of police training in the last 20 years. Sachs, Hearings at 41

Included in post-*Mapp* training are "much longer training periods for new officers, especially courses about constitutional rights," "in-service training, [which was] virtually non-existent before," a higher calibre of training, "training geared to practical situations such as stop and frisk exercises," and "testing constitutional law knowledge on promotional exams." *Id.*, at 41-42.

Even Professor Ball, a proponent of a "good faith" exception, concedes that the rule has accomplished "increased police training and awareness about their responsibilities." Ball, "Good Faith and the Fourth Amendment: The 'Reasonable' Exception to the Exclusionary Rule," 69 J. Crim. L & Criminology 635, 656 (1978).

Observers of police practices have also noted a gradual acceptance of the exclusionary rule over time, as officers accustomed to illegal practices have either retired or come to accept the rule and new officers, unused to the old standard, have been hired and trained to function within the law. See, e.g., Mertens and Wasserstrom, *supra*, 70 Geo. L. J. at 394-401; Sachs, Hearings at 23, 30.

The deterrent value of the exclusionary rule is also illustrated vividly by initial police reaction to *Mapp*. *Mapp* did not change substantive Fourth Amendment law one iota, yet in its wake then-New York City Police Commissioner Murphy argued that it had required total restructuring of his department's training procedures "from the very top administrators down to each of the thousands of foot patrolmen . . ." Kamisar, "Is the Exclusionary

Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment," 62 Judicature 66, 72 (1978) (quoting Murphy, "Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments," 44 Tex. L. Rev. 939, 941 (1966)).

Commissioner Murphy's reaction to *Mapp* underscores this Court's crucial observation in that case that an exclusionary rule was necessary, in part, because without it local police were simply not complying with the dictates of the Fourth Amendment. *Mapp* v. *Ohio, supra,* 367 U. S. at 657-658, 6 L. Ed. 2d at 1091-1092.[6] It was this same observation that led the California Supreme Court to adopt an exclusionary rule six years earlier in *People* v. *Cahan,* 44 Cal. 2d 434, 282 P. 2d 905 (1955). Explaining the evolution of his feelings on the matter, then-California Supreme Court Chief Justice Traynor later stated:

> My misgivings about its admissibility [illegally obtained evidence] grew as I observed that time after time it was being offered and admitted as a routine procedure. It became impossible to ignore the corollary that illegal searches and seizures were also a routine procedure subject to no effective deterrent . . . Traynor, *"Mapp* v. *Ohio* at Large in the Fifty States," 1962 Duke L. J. 319, 321-322

Sachs emphasized the same point when he testified that "in the heat of the chase, and in the absence of effective sanction, I believe that we would define those [Fourth Amendment] rights, to put it mildly, somewhat narrowly." Hearings at 38. Stated in other words, without an exclusionary rule, police would too often not follow the law.

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[6]This point was recently conceded by the Police Executive Research Forum in its prepared statement to the Senate Subcommittee Hearings, *Id.,* at 299.

A "Good Faith" or "Reasonable Belief" Test Would Encourage Police Ignorance, Halt Substantive Development of Fourth Amendment Law and Be Administratively Unfeasible.

A "good faith" exception to the exclusionary rule would also encourage police ignorance of the law, a circumstance that would itself produce greater police illegality. Professor Kaplan, a critic of the exclusionary rule, has stressed that such an exception

> would put a premium on the ignorance of the police officer and, more significantly, on the department which trains him. A police department dedicated to crime control values would presumably have every incentive to leave its policemen as uneducated as possible about the law of search and seizure so that a large percentage of their constitutional violations properly could be labeled as inadvertent. Kaplan, "The Limits of the Exclusionary Rule," 26 Stan L. Rev. 1027, 1044 (1974)

Judge Wilkey, an outspoken opponent of the rule, finds a "good faith" exception unpalatable, agreeing that "[t]he 'good faith' exception puts a premium on ignorance and lack of training in law enforcement agencies." Wilkey, "Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule," (National Legal Center for the Public Interest, 1982) at 36.

See also Schlesinger, Hearings at 72 and 803; prepared statement and letter of the Police Executive Research Forum, Hearings at 298 and 795; American Bar Association letter, Hearings at 797-798; Sachs statement, Hearings at 43; LaFave, "The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith,' " 43 Pitt. L. Rev. 307, 342-343 (1982); Mertens and Wasserstrom, *supra*, 70 Geo. L. J. at 431.

This Court did not develop substantive Fourth Amendment law until after *Weeks*, and it did not seriously apply substantive Fourth Amendment law to the states until after *Mapp*. A decision creating a "good faith" exception to the exclusionary rule would " 'stop dead in its tracks judicial development of . . . [these] rights.' " LaFave, *supra*, 43 Pitt. L. Rev. at 354, quoting Brennan, J., dissenting in *United States* v. *Peltier*, 422 U. S. 531, 554, 92 S. Ct. 2313, 45 L. Ed. 2d 374, 391 (1975).

Even if a "good faith" exception were stated to require an initial decision as to the legality of the police conduct involved, in practice busy trial courts with heavy dockets could be expected to do just the opposite. Such a practice would also be consistent with this Court's long-standing policy of avoiding constitutional questions whenever possible. *NAACP* v. *Alabama*, 357 U. S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958).

A "good faith" exception would also create an impossible administrative situation, requiring judges and defense attorneys to delve into the subjective intent of police officers whose self-serving words the former are unlikely to discount and the latter are unlikely to refute. Given the nature of the inquiry, an officer's personality and manner of address would become at least as significant as the facts of the arrest or search involved.

Nor would litigation likely be confined to scrutinizing the subjective processes of individual officers. Rather, the entire training program of a department would be at issue in at least some cases, and in others involving more than one officer (by no means a rare occurrence), the various and possibly conflicting states of mind of numerous officers would be at issue. The result would be "an unabated waste of judicial resources." Wilkey, *supra*. See also LaFave,

supra, 43 Pitt. L. Rev. at 355-357; Kaplan, *supra,* 26 Stan. L. Rev. at 1044-1045; Mertens and Wasserstrom, *supra,* 70 Geo. L. J. at 447-449.

A "good faith" standard, necessarily involving a case-by-case approach, would also be extremely difficult to apply with any degree of consistency or uniformity. Compare *Irvine* v. *California,* 347 U. S. 128, 74 S. Ct. 381, 98 L. Ed. 561 (1954), Jackson, J., plurality opinion, and Clark, J., concurring.[7]

The Exclusionary Rule Has Minimal Evidentiary Costs

A "good faith" exception is not warranted by the evidentiary costs of the rule. Contrary to the often-voiced claim that the rule results in large numbers of guilty persons going free, the empirical record belies this claim. As this Court stressed in *Elkins, supra,* 364 U. S. at 217, 4 L. Ed. 2d at 1677, the rule is remedial, not punitive, and it is not "the inevitable and certain result" of application of the rule "that the guilty criminal defendant goes free." Wilkey, "The Exclusionary Rule: Why Suppress Valid Evidence?" 62 Judicature 215, 223 (1978). Application of the rule results only in the loss of that evidence obtained by or directly derived from the violation. Only in

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[7]See also Pitler's response to the argument that only "non-technical" violations of *Miranda* v. *Arizona,* 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), should require exclusion:

> [Such a rule] involves a great deal of subjectivity on the part of judges, making it extremely difficult to draw any real lines of distinction. Unable to foresee what activity will result in the exclusion of evidence, law enforcement officials may find it difficult to establish workable rules of procedure and convenient not to take the proscription seriously. Pitler, " 'The Fruit of the Poisonous Tree' Revisited and Shepardized," 56 Cal. L. Rev. 579, 583 (1968).

possessory offense cases is an end to the prosecution likely to be "inevitable."[8, 9]

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[8]In many cases convictions are, in fact, obtained following reversal without the use of illegally seized evidence. In *Coolidge* v. *New Hampshire*, 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); *Davis* v. *Mississippi*, 394 U. S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1967); and *Bumper* v. *North Carolina*, 391 U. S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968), for example, defendants were all reconvicted without the use of the evidence suppressed in their individual cases. Cf. Mertens and Wasserstrom, *supra*, 70 Geo. L. J. at 445-446. The myth equating suppression with dismissal often draws on then-Judge Cardozo's well-known line from *People* v. *DeFore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926), "The criminal is to go free because the constable has blundered." Apart from the factual inaccuracy of the statement, Cardozo's suggested first alternative to suppression is also worth noting: "The officer might have been resisted . . ." *Id.* *Amicus* doubts that such an option was reasonable in 1926; in 1983, it is unthinkable.

[9]It is also untrue that "the exclusionary rule benefits only those who are unquestionably guilty." Supplemental Brief for the United States at 45. Evidence admitted at trial may establish, for example, that an accused was physically near contraband seized from a place in which the accused had a reasonable expectation of privacy, but this by itself neither proves that the accused was in legal possession of the contraband, nor is it always true that that was the case. Numerous persons find themselves in suspicious circumstances at one time or another without having committed any crime whatever.

The Solicitor General is similarly incorrect in asserting that suppression results in "erroneous verdicts." Supplemental Brief at 14. The Fifth Amendment privilege preventing a guilty defendant from being required to incriminate himself or herself, the attorney-client privilege and the marital privilege at times all result in probative, truthful evidence not being presented at trial. Similarly, the prosecution may fail to present sufficient evidence to establish a guilty accused's guilt beyond a reasonable doubt. Just as acquittals under these circumstances are not "erroneous verdicts," so, too, is a verdict not erroneous when evidence has been withheld in order to protect Fourth Amendment values.

The exclusionary rule does not define in any way what police conduct is lawful or unlawful; it merely defines the procedural remedy for some unlawful conduct. It is the Fourth Amendment which restricts the activities of the police and of the courts, and it is the Fourth Amendment which, when followed, at times deprives the government of some evidence.

An officer who complies with the Fourth Amendment in the first place obtains no less admissible evidence than an officer who has violated the rule and had evidence suppressed as a result. In fact, the prudent officer may obtain *more* admissible evidence. By obtaining a properly supported search warrant to support his or her actions in a situation where another officer acts unjustifiably without a warrant, or hastily with an inadequate warrant, for example, the officer abiding by the Constitution obtains more evidence for use in a prosecution.

Empirical evidence on the evidentiary costs of Fourth Amendment enforcement within the federal system demonstrates an extremely minimal impact on the results of criminal prosecutions. In a 1979 study of 2,804 defendant cases in 38 United States Attorneys' offices, the General Accounting Office found that in less than half the cases involving a search or seizure was a motion to suppress even filed and that in only 1.3% of the defendant cases was evidence excluded as the result of the filing of a motion to suppress. General Accounting Office, "Impact of the Exclusionary Rule on Federal Criminal Prosecutions," (1979) at 9-11. Even where a motion was granted in whole or in part, the rate of conviction remained over 50% (as compared with an 84% conviction rate in cases where motions had been denied). *Id.*, at 13. Overall, a finding of illegal search and seizure resulted in dismissal or acquittal in only

0.7% of the cases studied. Moreover, in cases where prosecution was declined, search and seizure considerations played a part in the decision not to prosecute in only 0.4% of cases. *Id.*, at 13-14.[10]

Two other studies, one of prosecutions in Washington, D.C., and other cities by the Institute for Law and Social Research [Inslaw] and the other in New York City by the Vera Institute of Justice, provide further support. Inslaw found that Fourth Amendment issues "appear to have little impact on the over-all flow of criminal cases after arrest." Geller, *supra*, 67 ABA J. at 1644.

The Vera Institute concluded further that the exclusionary rule "does not seem to produce dismissals in cases brought into the criminal process in which the searches are probably illegal and the evidence could be suppressed." *Id.*

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[10]Citing the December 1982, National Institute of Justice report, "The Effects of the Exclusionary Rule: A Study in California," the Solicitor General criticizes the GAO report, claiming that " '[m]ost of the federal caseload at the time of the [GAO] study was composed of such white collar crimes as embezzlement, fraud and forgery. Search and seizure issues are seldom raised in these cases.' " Supplemental Brief at 48, citing NIJ study at 7. The NIJ study cites no authority for this claim, and, in fact, it is incorrect. The GAO study determined that, depending on the size of the United States Attorney's office studied, between 69% and 88% of the cases accepted for prosecution involved charges where seized evidence would be susceptible to search and seizure challenge. GAO report, Appendix II at 7.

At the Senate Subcommittee hearings the Government also questioned the reliability of the GAO's findings for their asserted failure to consider prosecutions dropped prior to formal entry into the system. Hearings at 87. However, this factor, too, was expressly accounted for in the study. GAO report, Appendix II at 13-14.

Most recently, the 1982 National Institute of Justice study, "The Effects of the Exclusionary Rule: A Study in California," found that only 4.8% of all felony cases rejected for prosecution in California between 1976 and 1979 —only 0.8% of all cases referred for prosecution—were declined for search and seizure problems.[11, 12]

Professor LaFave has also written that, "[T]here is reason to believe that the 'cost' of the exclusionary rule, in terms of acquittals or dismissed cases, is much lower than is commonly assumed." LaFave, *Search and Seizure* §1.2 n 9 (1981 Supp).

The American Bar Association, which "strongly supports retention of the exclusionary rule" on constitutional and practical grounds, has concluded that the "rule is not responsible for hordes of criminals going free" and that "a dispassionate examination of the facts belies the mythology

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[11]520,993 cases were presented for prosecution in California in 1976-1979, of which 4,130 were rejected for search and seizure problems. To the NIJ, this demonstrated "a major impact of the exclusionary rule on state prosecutions." NIJ study at 2. This conclusion is impossible to square with the study's own factual results, however.

[12]*Amici* Seven Former Members of the Attorney General's Task Force, *et al.*, assert in their Brief that the NIJ study, *supra*, found that 71.5% of all felony drug cases statewide between 1976 and 1979 and 74% of all felony drug cases in San Diego County in 1980 were rejected for search and seizure problems. These statements are grossly inaccurate. In fact, of all felony complaints presented for prosecution statewide between 1976 and 1979, 16.5% (86,033 cases) were rejected; of the rejections, search and seizure problems accounted for only 4.8% (4,130) cases; 71.5% (2,953 cases) *of the 4.8%* rejected for search and seizure problems were drug cases. Similarly, in San Diego County in 1980, 14,478 cases were presented for prosecution and 26.5% (3,840 cases) were rejected. Of these rejections, only 8.5% (327 cases) were for search and seizure problems; 74% *of the 8.5%* rejected for search and seizure problems were drug cases. NIJ study at 10-12.

surrounding the rule." 67 ABA J. 1614 (1981); see also Greenhalgh, Hearings at 76 ff.

The exclusionary rule is also extremely limited in application, many of these limitations having been added by this Court in the past ten years.[13] In its present form, the rule is available only to individuals whose personal Fourth Amendment rights have been violated, *United States* v. *Salvucci*, 448 U. S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980); *Rawlings* v. *Kentucky*, 448 U. S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980); and it does not prevent the use of unconstitutionally seized evidence before a grand jury, *United States* v. *Calandra*, 414 U. S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974), or in civil proceedings, *United States* v. *Janis*, 428 U. S. 433, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976), or in impeaching a defendant's testimony. *United States* v. *Havens*, 446 U. S. 620, 100 S. Ct. 1912, 64 L. Ed. 2d 559 (1980).

The exclusionary rule will also not prevent a person's prosecution when he or she has been unconstitutionally seized, *Frisbie* v. *Collins*, 342 U. S. 519, 72 S. Ct. 509, 96 L. Ed. 541 (1952), nor a victim's in-court identification of an accused following an illegal arrest, *United States* v. *Crews*, 445 U. S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980), nor the use of evidence discovered by means independent of police misconduct, *United States* v. *Ceccolini*, 435 U. S. 268, 96 S. Ct. 1054, 55 L. Ed. 2d 268 (1978), or evidence whose connection with the constitutional violation is so attenuated as to dissipate the taint. *Nardone* v.

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[13]Many of these changes have come subsequent to Justice White's dissent in *Stone* v. *Powell*, 428 U. S. 465, 536-542, 96 S. Ct. 3037, 49 L. Ed. 2d 1067, 1112-1115 (1976), in which he criticized the breadth of the rule and suggested a "good faith" exception.

United States, 308 U. S. 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939). Evidence gained as a result of an arrest valid on Fourth Amendment grounds but for violation of an enactment later held unconstitutional on due process grounds is also admissible. *Michigan* v. *DeFillippo,* 443 U. S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979).

In addition, a state prisoner who has had an opportunity for full and fair litigation of Fourth Amendment claims in state court may not obtain federal *habeas corpus* relief on the ground that evidence introduced at his or her trial was obtained as a result of an unconstitutional search or seizure. *Stone* v. *Powell, supra.*

The Symbolic Costs of a "Good Faith" or "Reasonable Belief" Exception

Creation of a "good faith" exception to the exclusionary rule would also have a stark symbolic and human significance. To this Court the public and the police, the ultimate yardstick of legality is admissibility:

> A ruling admitting evidence at a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence. *Terry* v. *Ohio, supra,* 394 U. S. at 13, 20 L. Ed. 2d at 901.

A decision creating a "good faith" exception would lead police to feel that "the fourth amendment is not a serious matter, if indeed it applies to them at all." Loewenthal, *supra,* 49 UMKC L. Rev. at 30. Professor Ball, too, concedes that "[a] signal from the Court that it is abating its aggressive enforcement of fourth amendment requirements is apt to evoke a consistent response from the police." *Id.,* 69 J. Crim. L. & Criminology at 656. See also LaFave, *supra,* 43 Pitt. L. Rev. at 358.

> Moreover, police doubts are likely to be stronger now than they would be if the exclusionary rule had never

> been imposed. *Since the rule has become functionally identified with the fourth amendment, the removal of the rule is likely to be interpreted as an implicit condoning of violations of the fourth and fourteenth amendments, no matter what substitute remedies may be applied.*[14] Loewenthal, *supra,* 49 UMKC L. Rev. at 30 (emphasis added)

History also teaches that where police illegality occurs, the victims of that illegality are disproportionately members of racial minorities. "[O]ur unexpiated heritage of racism," McGowan, "Rule-Making and the Police," 70 Mich. L. Rev. 659, 669 (1972), has long been reflected in police lawlessness against minorities. Cf., e.g., *Report of the National Advisory Commission on Civil Disorders* (1968) at 301 and 304. This Court, too, has noted the problem of chronic police-community tension in black and other minority communities. *Terry, supra,* 392 U. S. at 14, 20 L. Ed. 2d at 902, n 11.

The dramatic increase in police training and awareness generated by the exclusionary rule has produced, in turn, an increased respect by police for individuals' constitutional rights, an incomplete process of particular value

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[14]In fact, there are no viable alternatives to exclusion. The Solicitor General concedes this possibility, Supplemental Brief at 63-64, and this Court, too, has suggested doubts as to alternatives other than exclusion. *Franks* v. *Delaware,* 438 U. S. 154, 169, 98 S. Ct. 2674, 57 L. Ed. 2d 667, 681 (1978).

Additionally, to the extent that civil remedies might be viable in some cases, where the error was a judicial officer's, the potential defendant is immune from suit. *Stump* v. *Sparkman,* 435 U. S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978).

Further, because of lack of access to legal services and lack of capacity to prove damages, poor persons are the least likely victims of police misconduct to be in a position to bring successful civil actions.

to minorities and one that will be reversed if the proposed exception is created.

In the twenty-two years since *Mapp,* the exclusionary rule has become an accepted fact of life to the officer on the beat, the police administrator responsible for departmental training and the average citizen going about his or her daily life. See pp. 13-14, *supra.* It has increasingly become a part of the basic fabric of our criminal procedure, an aspect of due process " 'rooted in the traditions and conscience,' " *Rochin* v. *California,* 342 U. S. 165, 169, 72 S. Ct. 205, 96 L. Ed. 183, 188 (1952), of a full generation of Americans.

Moreover, due process has always been considered by this Court to be a forward-looking concept reflecting a "progressive and self-confident society," *McNabb* v. *United States,* 318 U. S. 332, 344, 63 S. Ct. 608, 87 L. Ed. 819, 826 (1943), and retreat from prior constitutionally-based holdings has been strongly disfavored.

Just as *Miranda* v. *Arizona,* 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), was widely and intensively criticized for many years but was ultimately reconfirmed in *Edwards* v. *Arizona,* 451 U. S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 784 (1981), so, too, ought this Court reject any modification of the exclusionary rule. Adherence to prior decisions is a paramount principle in the law, and only in cases of the clearest error will this Court set aside its own prior judgment:

> It is almost as important that the law should be settled permanently, as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous. Vacillation is a serious evil. *Gilman* v. *Philadelphia,* 3 Wall 713, 724, 18 L. Ed. 96, 99 (1866).

This principle is particularly important where a rule sought to be overruled or significantly modified is a relatively recent one, especially where the composition of the Court has altered substantially in the interim.[15]

It is, of course, self-evident that the Fourth Amendment does not by its express language specify how it is to be enforced. It neither states that evidence obtained in violation is to be suppressed nor that evidence obtained in a "reasonable belief" that the police conduct was legal is to be admitted. Similarly, no language in the Constitution says how this Court is to enforce the equal protection clause in the areas of public education and voting, yet to give these rights *effective* meaning this Court has ruled that separate educational facilities for black and white children are inherently unequal, *Brown* v. *Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), and that, in drawing legislative boundaries, each state must accord equal strength to each citizen's vote. *Baker* v. *Carr*, 368 U. S. 186, 86 S. Ct. 691, 7 L. Ed. 2d 663 (1962). The Constitution by its language also does not state that the right to assistance of counsel includes the right to *effective* assistance, but just as the Court inferred such a requirement in *Powell* v. *Alabama*, 287 U. S. 45, 71, 53 S. Ct. 55, 77 L. Ed. 158, 172 (1932), to give that right meaning, so, too, have *Weeks*, *Mapp* and their progeny required suppression of unconstitutionally seized evidence in order to assure a viable Fourth Amendment.

If appellate decisions interpreting the Fourth Amendment are at times obscure and difficult to understand, and

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[15] Cf., e.g., *Malinski* v. *New York*, 324 U. S. 401, 417, 64 S. Ct. 781, 89 L. Ed. 1029, 1039 (1945), Frankfurter, J., concurring: "The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncracies of a merely personal judgment."

if individual officers cannot be deterred from actions held to be errors through subsequent changes in the law, then the answers lie in better training of law enforcement personnel, better communication between prosecutors' offices and police agencies and, to the extent possible, more consistent and understandable judicial opinions. Moreover, principles of retroactivity may be re-examined. Cf., e.g., *United States* v. *Johnson*, ___ U. S. ___, ___ S. Ct. ___, 73 L. Ed. 2d 202 (1982). To react to these and other circumstances by reducing Fourth Amendment protections, particularly to the level of police officers' subjective understanding, however, would subvert the Amendment and the values it embodies. The "[r]ights declared in words" would ". . . be lost in reality." *Weems* v. *United States*, 217 U. S. 349, 373, 30 S. Ct. 544, 54 L. Ed. 793, 801 (1910). They would become "a form of words," "an empty promise."

CONCLUSION

By its holdings, the language used to express those rulings and the symbolic meaning attached to them by those most directly affected as well as by the public in general, this Court shapes not just the Constitution but many aspects of our society for the generations that will follow us. As technology progresses and Fourth Amendment rights become increasingly fragile against "a vast array of electronic surveillance," *United States* v. *Bailey*, 628 F. 2d 938, 947-949 (6th Cir. 1980), Keith, J., concurring, it is increasingly important that this Court recall the history and values of the Amendment to assure its protection in the face of new, more insidious dangers.

Addressing the above concerns, Justices Brandeis and Stewart prophetically explained why this Court must reject the proposed exception:

> In a government of laws, existence of the government will be imperilled if it fails to observe that law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. *Olmstead* v. *United States, supra,* 277 U. S. at 485, 75 L. Ed. at 960, cited with approval in *Elkins, supra,* 364 U. S. at 223, 4 L. Ed. 2d at 1680-1681.
>
> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law [the Fourth Amendment] and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important. *Coolidge* v. *New Hampshire, supra,* 403 U. S. at 455, 29 L. Ed. 2d at 476.

For all of these reasons, a "reasonable belief" or "good faith" exception to the exclusionary rule should be rejected, and the exclusionary rule should be reaffirmed in its present form.

Respectfully submitted,

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ACKNOWLEDGMENT OF SERVICE

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KENNETH M. MOGILL

Amicus Brief

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IN THE

Supreme Court of the United States

October Term, 1982

THE STATE OF ILLINOIS,
Petitioner,

v.

LANCE GATES, et ux.,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF AMICUS CURIAE FOR THE NEW YORK CRIMINAL BAR ASSOCIATION

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Question Presented

Whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Weeks* v. *United States*, 232 U.S. 383 (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

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IN THE

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No. 81-430

THE STATE OF ILLINOIS,

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v.

LANCE GATES, et ux.,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF AMICUS CURIAE FOR THE NEW YORK CRIMINAL BAR ASSOCIATION

Interest of Amicus Curiae New York Criminal Bar Association

The New York Criminal Bar Association, founded in 1972, is New York's principal organization of defense attorneys who specialize in criminal law. All parties to this proceeding have given the Association written consent to file this brief. Copies of such consent have been filed with the Clerk of this Court.

The instant case has important implications for the enforcement of constitutional guarantees granted to cit-

izens under the Fourth Amendment and, consequently, greatly affects the concerns and work of the Association and its members. The Association believes that its members' special expertise and knowledge in this area of criminal law and procedure can assist the Court in resolving the issues presented. This brief, filed in support of Respondent's claim that the decision below should be affirmed, will seek to show that the warrant requirement, supported by a constitutionally sufficient showing of probable cause, cannot be compromised by permitting its issuance upon any lesser standard based upon either the good faith of the officers seeking the warrant (Point I) or the good faith of the magistrate issuing it (Point II).

Summary of Argument

1. Petitioner's argument for the adoption of a "good faith" exception* is premised on an incorrect analysis of this Court's decisions that the exclusionary rule is applicable only where it will yield a substantial deterrent benefit. Petitioner's argument places undue emphasis on the factor of deterrence. *United States* v. *Johnson*, 102 S. Ct. 2579 (1982) rejected the notion that deterrence constitutes the single or dominant basis for the application of the exclusionary rule by giving retroactive effect to *Payton* v. *New York*, 445 U.S. 573 (1980). *Johnson* ruled that, wholly apart from deterrence, a historic rationale for applying the exclusionary rule is the "imperative of judicial integrity." *Johnson*, therefore, dispels the notion that the

* The "good faith" exception covers the unconstitutional conduct of a police officer who mistakenly violates the Fourth Amendment in a good faith, reasonable belief that his conduct is justified.

exclusionary rule must be restricted to instances where there is a definitive showing that it will have a substantial impact in deterring unlawful police conduct.

2. The "good faith" exception will cut across the entire sweep of the Fourth Amendment—not just a limited category of searches. Accordingly, its adoption will result in the public becoming fearful that it can no longer be secure against unreasonable searches, a situation contrary to the actual wording of the first clause of the Fourth Amendment. To most Americans, the exclusionary rule, first utilized by an American court in 1903 [*State* v. *Sheridan*, 121 Iowa 164, 96 N.W. 730 (1903)], is recognized as part and parcel of those evolving standards of decency which help make this country free. American citizens recognize the exclusionary rule not as simply a procedural vehicle applied to exclude evidence from a criminal trial—it also protects a citizen from an unlawful seizure of his or her papers, articles, and effects. It is no consolation to a citizen that a Fourth Amendment violation in seizing these items happened to be unintentional. Nor does that circumstance make the violation any easier to tolerate.

3. The "good faith" exception is also in conflict with a new trend of Supreme Court decisions—the development of "bright lines" whereby police are informed precisely when an invasion of privacy to obtain evidence is permissible. The "good faith" exception will defeat the "bright line" objective of molding police conduct to comply with uniform Fourth Amendment rules. The exception will induce the police, when facing the choice of taking evidence or abstaining from a particular search, into succumbing to the temptation of seizing the evidence, under the guise

of reasonableness. Also, the courts will no longer find it essential to strive for the simple rules developed in the "bright line" cases. With the adoption of the "good faith" exception, the adjudicatory process will simply shift to a case by case inquiry of whether a particular unlawful search comes within the "good faith" exception.

4. The "good faith" exception should not be employed to preclude judicial review of invalidly issued search warrants. The "good faith" exception is an inadequate substitute for probable cause and the other safeguards insuring an effective warrant procedure. Analytically, it is illogical for the exception to be applied in a case where a police officer relied not upon his or her training, education, and experience, but upon the incorrect actions of a judge in issuing a warrant. The notion that it will not help to deter unlawful police action by holding the police responsible for the issuance of an invalid warrant is skewed. The issue is not whether judicial review of a warrant will help to deter police; the issue is whether entrusting magistrates with unrestrained power to issue warrants will eliminate the protections accorded by the warrant process.

5. Undeniably, it is not the mere issuance of a search warrant that matters. Indeed, the adoption of the Warrant Clause of the Fourth Amendment grew out of the practice during the colonial period of issuing arbitrary, general warrants, which posed no limitation to the articles an officer could seize. Accordingly, protection of the interests guaranteed by the Fourth Amendment mandates strict compliance with the requirements of probable cause, neutrality of the magistrate, and particularity of the warrant. En-

forcement of these requirements should not be left solely in the hands of a magistrate.

6. A magistrate is not required to be an attorney, and the *ex parte* proceeding in which the decision to issue a warrant is made can expose the warrant process to potential abuse. Without judicial review, the magistrate may be tempted to give undue deference to the policeman with whom he may have regular contact in an *ex parte* context. The foregoing factors may also lead the magistrate to make a hurried, uncaring analysis of the facts before him or to act simply as a "rubber stamp."

7. In short, while it may be desirable to strive to bring more flexibility to the standards bearing upon the issuance of search warrants, the Court should not permit the magistrate's decision on the warrant to control the outcome of a criminal proceeding. To do so would give magistrates unprecedented power to make binding and non-reviewable interpretations of the Constitution.

Argument

The Court has expanded the initial grant of *certiorari* in this case to review the continued application of the exclusionary rule adopted in *Weeks* v. *United States*, 232 U.S. 383 (1914), as made applicable to the States in *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Petitioner, joined by the United States as *amicus*, argues that the exclusionary rule no longer should be applied to the following cases: (1) warrantless searches where the police officer has acted reasonably and in good faith, but under the mistaken view that his conduct complied with the Fourth Amendment; and (2)

except in egregious situations, any case in which a search warrant has been unconstitutionally issued by a judicial officer. The Court should reject the proposed "good faith" exception as an unwarranted evisceration of the probable cause requirement of the Fourth Amendment and the "imperative of judicial integrity" recognized repeatedly by this Court in its analysis of Fourth Amendment claims.

I

Petitioner argues that since the primary purpose of the exclusionary rule is the deterrence of unlawful future conduct by the police, and since no substantial deterrent benefit will be gained from applying the rule in cases where a police officer had a good faith, reasonable belief that his conduct was lawful, the officer's "good faith" should be recognized as an exception to the exclusionary rule. Petitioner places far too much emphasis on the factor of future deterrence as being the dominant, if not sole, reason for the development of the exclusionary rule.*

As recently as last Term, this Court, in *United States* v. *Johnson*, 102 S. Ct. 2579 (1982), rejected the notion that the benefits of deterrence constitute the exclusive criteria

* With respect to the deterrence factor, this Court has held that the extension of the exclusionary rule to proceedings ancillary or collateral to a criminal trial is not appropriate unless a substantial deterrent benefit can be gained from the rule's application in such a context. Thus, the exclusionary rule has not been applied where it would disrupt Grand Jury proceedings [*United States* v. *Calandra*, 414 U.S. 338 (1974)], permit relitigation of search and seizure claims already determined in state court [*Stone* v. *Powell*, 428 U.S. 465 (1976)], and prevent a second sovereign from using illegally seized evidence in a civil proceeding to collect taxes due the federal government [*United States* v. *Janis*, 428 U.S. 433 (1976)]. This it not to suggest, however, that the deterrence rationale does not retain its force in cases such as this one.

for the applicability of the exclusionary rule. *Johnson* gave a measure of retroactive effect to *Payton* v. *New York,* 445 U.S. 573 (1980), which held that the police, absent exigent circumstances, must obtain an arrest warrant in order to arrest a suspect in his home, a point previously unsettled in the development of Fourth Amendment law. While holding a Fourth Amendment decision retroactive can hardly be expected to yield appreciable deterrent benefit, *Johnson* offered a different but familiar rationale, relying on an earlier dissent by Justice Harlan in *Desist* v. *United States,* 394 U.S. 244 (1969):

> We do not release a criminal from jail because we like to do so or because we think it is wise to do so, *but only because the Government has offended constitutional principle in the conduct of this case.* And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. *Id.* 102 S. Ct. at 2594, citing *Desist,* 394 U.S. at 258 (Harlan, J., dissenting) (emphasis added).

United States v. *Johnson* appears to offer a familiar historic rationale for continuing to apply the exclusionary rule in criminal trials: the "imperative of judicial integrity," first articulated in *Weeks* v. *United States,* 232 U.S. 383 (1914). In *Elkins* v. *United States,* 364 U.S. 206 (1960), this Court emphasized in particular the "imperative of judicial integrity," namely, that the courts do not become "accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Id.* at 222-223. This language was relied upon in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), applying the exclusionary rule to the States, and in such subse-

quent cases as *Terry* v. *Ohio*, 392 U.S. 1 (1968), which held that:

> Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. *Id.* at 13.

A further purpose of the exclusionary rule is that "of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining the popular trust in Government." *United States* v. *Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting). This rationale has its roots as early as *Weeks, supra*, which in 1914 banned evidence obtained in violation of the Fourth Amendment from the federal courts:

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects against all unreasonable searches and seizures under the guise of the law. This protection reaches all alike, whether accused of a crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained

> after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.
>
> * * *
>
> To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibition of the Constitution; intended for the protection of the people against such unauthorized action. 232 U.S. at 391-92, 394.*

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* The "imperative of judicial integrity" is not unique to the Fourth Amendment. It has been applied in determining whether the courts have been guilty of participating in the denial of equal protection of the laws under the Fourteenth Amendment to a black citizen. In *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), this Court refused to sanction the use of judicial power to enforce contracts between private parties containing a restrictive covenant aimed at racial segregation. The Equal Protection Clause, the Court wrote, forbade courts from becoming involved in helping a party obtain enforcement of a restrictive covenant:

> These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being accorded full enjoyment of those rights on an equal footing. *Id.* at 19.

Compare *Edwards* v. *Habib*, 397 F.2d 586 (D.C. Cir. 1968) (Fourteenth Amendment ban on "state action" prohibits court from entertaining an action for eviction brought by landlord against tenant, after tenant had petitioned public housing official to complain about building violations). Just as the concept of "state action" prohibits the courts from sanctioning a private person's committing an act constitutionally forbidden, the courts must not sanction and refuse to redress such unlawful activity when it is in fact committed by public officials.

The Court should not give its approval to unconstitutional searches and seizures and must reject adoption of the "good faith" exception. The exception will affect the entire sweep of the Fourth Amendment—not just a limited category of searches (e.g., automobile or inventory searches)—and will legitimize many unconstitutional searches.* There thus exists the substantial risk that the public will become fearful that it is no longer secure against the lawless conduct which the exception here will legitimize, a development clearly contrary to the provision of the Fourth Amendment that "The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ."

The public's fear that it will no longer be secure against unreasonable searches and seizures will be aggravated by the fact that the exclusionary rule has been part of American history for nearly eighty years, having been recognized initially by the Supreme Court of Iowa in 1903. *State* v. *Sheridan*, 121 Iowa 164, 96 N.W. 730 (1903). Since that time, despite present criticism, the exclusionary rule has become part of the fabric of what Americans have come to regard as those evolving standards of decency that have helped to make this country a free place to live. From the standpoint of the citizenry (and its expectation of privacy), the protection offered by the exclusionary rule encompasses more than simply the exclusion of unlawful evidence from a criminal trial. Compare *Lankford* v. *Gelston*, 364

* Arguably, a large number of searches previously determined to be unreasonable under the Fourth Amendment may fall within the ambit of the "good faith" exception and, therefore, now be deemed "lawful". See, e.g., *Ybarra* v. *Illinois*, 444 U.S. 85 (1979); *Brown* v. *Texas*, 443 U.S. 47 (1979).

F.2d 197 (4th Cir. 1966) (injunctive relief granted against overbroad police searches invasive of citizens' rights to privacy). The exclusionary rule, in effect, provides meaningful enforcement of the ban against unwarranted interference with what goes on behind a citizen's closed doors, where a citizen does not have to answer for his conduct, and where what a citizen does is simply nobody else's business, except his or her own. Compare *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

In short, for the public suddenly to be informed that substantial numbers of Fourth Amendment violations now must go uncorrected will create an intolerable burden for members of a free society where Fourth Amendment rights have always been of paramount concern. And it must be remembered that it is no consolation to a citizen that his Fourth Amendment rights were violated unintentionally. This does not make an unlawful confiscation of a citizen's papers and effects any more tolerable. Compare *G.M. Leasing Corp.* v. *United States*, 439 U.S. 338 (1977). Accordingly, for this Court to hold that unlawful searches and seizures will not be condemned will cause substantial apprehension among the citizenry, contrary to the purpose underlying the Fourth Amendment.

The adoption of a "good faith" exception will also constitute a step backward from the recent direction of this Court's decisions, which have recognized the necessity for striking an appropriate balance between the societal concern for adequate safety for its citizens and the need for an individual citizen's privacy. These are the so-called "bright line" cases [*United States* v. *Ross*, 456 U.S. 798 (1982); *New York* v. *Belton*, 453 U.S. 454 (1981); *Robbins* v. *California*, 453 U.S. 420 (1981); *Dunaway* v. *New York*,

442 U.S. 200 (1980); *United States* v. *Robinson*, 414 U.S. 218 (1974)] which are clearly inconsistent with the "good faith" exception.

While retaining the exclusionary rule, the Court, in these "bright line" decisions, has begun the standardization of the law of search and seizure, so that with the resulting clarity in the law, police will know precisely when an invasion of privacy to obtain evidence for prosecution is permissible. "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway* v. *New York*, 442 U.S. at 213-14.

The development of "bright lines" in the Fourth Amendment area will become pointless and, indeed, will become frustrated by a "good faith" exception to the exclusionary rule. It will defeat the "bright line" cases' objective of molding police conduct to comply with uniform and standardized Fourth Amendment rules. No doubt, the police, when faced with the choice of taking evidence or abstaining from a search and seizure, will choose the path of least resistance—succumbing to the temptation of seizing the evidence in question. Under the "good faith" exception, this will result in a hodge-podge of individualized, as opposed to uniform, responses to Fourth Amendment problems—in the expectation that the courts will find that the officer had a "good faith, reasonable belief" that a search was authorized.

The courts thus will no longer find it essential to strive for simple, plain rules that can be easily applied by police officers. The adjudicatory process will simply shift to a

case by case examination of whether a particular police officer's conduct fits within the "good faith" exception. Confusion will thus continue to reign in the Fourth Amendment area. It is clear that consonant with the "bright line" approach, this Court should not compromise the constitutionally required standard of probable cause through acceptance of a "good faith" exception. Indeed, prior decisions of this Court have made it clear that probable cause may not be established simply by showing that the officer who made the challenged arrest or search subjectively believed that he had valid grounds for his actions. See 1 W. La Fave, *Search and Seizure—A Treatise on the Fourth Amendment* §3.2(b) at 459 (1978). As the Supreme Court emphasized in *Beck* v. *Ohio*, 379 U.S. 89 (1964):

> We may assume that the officers acted in good faith in arresting the petitioner. But "good faith on the part of the arresting officers is not enough" (citation omitted). If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects" only in the discretion of the police. *Id.* at 97.

The probable cause test, then, is an objective one. This is further reflected in the fact that this Court repeatedly has said that in order for there to be probable cause the facts must be such as would warrant a belief by "a prudent man" [*Henry* v. *United States*, 361 U.S. 98 (1959)]; "a man of reasonable caution" [*Draper* v. *United States*, 358 U.S. 307 (1959); *Brinegar* v. *United States*, 338 U.S. 160 (1949); *Carroll* v. *United States*, 267 U.S. 132 (1925)], or "a reasonably discrete and prudent man" [*Dumbra* v. *United States*, 268 U.S. 435 (1925)].

As the Court held in *Terry* v. *Ohio*, 392 U.S. 1 (1968),

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate. *Id.* at 21-22.

Clearly, then, the constitutionally mandated standard of probable cause may not be compromised by enactment of a "good faith" exception; nor may the determination of probable cause be judged by anything less than objective standards. Insofar as a "good faith" exception would compromise these "bright line" standards, it is constitutionally invidious.

II

Petitioner further contends that the "good faith" exception should be applied to preclude judicial review of the issuance of all search warrants. It is argued that a policeman's obtaining a warrant:

> is a particularly compelling example of good faith. A warrant is a judicial mandate to an officer to conduct a search or make an arrest and the officer has the sworn duty to carry out its provisions. Accordingly, we believe that there should be a rule which states that evidence obtained pursuant to and within the scope of a warrant is *prima facie* evidence of good faith on the

part of the officer seizing the evidence. *Attorney General's Task Force on Violent Crime, Final Report* 55 (August 17, 1981).

Plainly, the "good faith" exception should not be used as a substitute for probable cause and the other safeguards insuring an effective warrant procedure. It may well be plausible to speak about the viability of the "good faith" exception when a police officer, reasonably relying upon his training, education and experience, mistakenly violates the Fourth Amendment. Yet, there is no logic in applying the exception when the police officer relies upon the incorrect actions of the judiciary in warrant cases. In the latter situation, the police officer, who merely brings information to the magistrate, makes no judgment or assessments at all concerning the lawfulness of a particular search and seizure. The magistrate performs this function for the officer by deciding, on the basis of the information presented, whether an intrusion is justified [*Aguilar* v. *Texas*, 378 U.S. 108 (1964)] and the permissible scope of the intrusion [*Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979)]. The officer thus does no more than perform the ministerial execution of the search warrant.

Since the purpose of the "good faith" exception is to excuse an error the police could not reasonably have avoided, the exception should not be extended to cases where the unconstitutional error was committed not by the police, but by the judiciary. The claim that banning the fruits of an invalid search warrant will not deter unlawful police searches is simply beside the point. The focus here should not be upon the exclusionary rule's impact on the police but rather upon the exclusionary rule's insuring an effective

search warrant procedure. The question thus presented is whether entrusting magistrates with non-reviewable power to issue search warrants will dilute, if not completely eliminate, the protections accorded by the warrant process.

Initially, it cannot be gainsaid that the Fourth Amendment Warrant Clause provides a critical safeguard against interferences with a person's reasonable expectation of privacy [*Katz* v. *United States*, 389 U.S. 347 (1967)]. This Court's decisions have emphasized that the warrant procedure must be followed in every case unless it can be shown that one of the "well delineated" exceptions is applicable.* In the case at bar, for example, a warrant was obtained to enter the home, a place in which the Court has stressed an individual enjoys an exceedingly high expectation of privacy. *Steagald* v. *United States*, 451 U.S. 204 (1981); *Payton* v. *New York*, 445 U.S. 573 (1980); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971).

But it is not the mere issuance of a search warrant that matters. Indeed, the enactment of the Warrant Clause of the Fourth Amendment was in response to the colonists' objection to the use of oppressive, general warrants, a practice that had been exported from England to America. The Warrant Clause "grew out of colonial opposition to the infamous general warrants known as writs of assistance,

* The exceptions recognized thus far are: consent (*Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973)); searches incident to an arrest (*Chimel* v. *California*, 395 U.S. 752 (1969)); cases of diminished expectation of privacy (*United States* v. *Ross*, *supra*); exigent circumstances (*Mincey* v. *Arizona*, 439 U.S. 385 (1978); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971)); and cases in which there is simply nothing to tell the magistrate (*South Dakota* v. *Opperman*, 428 U.S. 364 (1976) (warrantless inventory search)).

which empowered customs officers to search at will, and to break open receptacles or packages, wherever they suspected uncustomed goods to be." *Payton* v. *New York*, 445 U.S. at 608 (White, J., dissenting).

To protect those privacy interests guaranteed by the Fourth Amendment, there must be strict observance of the requirements of probable cause [*Beck* v. *Ohio*, 379 U.S. 89 (1964)], the neutrality of the magistrate [*Connally* v. *Georgia*, 429 U.S. 245 (1977)], and the particularity of the warrant [*Lo-Ji Sales, Inc.* v. *New York, supra*]. Numerous decisions of this Court developing the definition of probable cause have held that it must be based on more than an unconfirmed suspicion, rumor, or report. *United States* v. *Harris*, 403 U.S. 573 (1971); *Spinelli* v. *United States*, 393 U.S. 410 (1969); *United States* v. *Ventresca*, 380 U.S. 102 (1965); *Beck* v. *Ohio, supra; Aguilar* v. *Texas, supra; Jones* v. *United States*, 362 U.S. 257 (1960); *Henry* v. *United States*, 361 U.S. 98 (1959); *Draper* v. *United States*, 358 U.S. 407 (1959); *Giordenello* v. *United States*, 357 U.S. 480 (1958); *Brinegar* v. *United States*, 338 U.S. 160 (1949); *Johnson* v. *United States*, 333 U.S. 10 (1948); *Nathanson* v. *United States*, 290 U.S. 41 (1933); *Grau* v. *United States*, 287 U.S. 124 (1932); *Byars* v. *United States*, 273 U.S. 28 (1927). Adoption of a good faith exception would effectively leave the magistrate's determinations in this regard virtually unreviewable.

Thus, the question here is whether it is constitutionally wise to leave the enforcement of the warrant procedure exclusively in the hands of a judicial magistrate, whose determinations will no longer be subject to further judicial review.

Initially, it may be noted that a magistrate is qualified to issue a search warrant even if he is not an attorney. *Shadwick* v. *City of Tampa*, 407 U.S. 345 (1972). A magistrate without legal training is ordinarily far less conversant with Fourth Amendment concepts than a judge. It cannot be presumed in these circumstances that a magistrate will consistently and correctly decide the difficult questions pertaining to probable cause and the permissible scope of a search and seizure.

Moreover, the warrant application is an *ex parte* proceeding which can expose the process to potential abuse. In the absence of the policeman's or prosecutor's adversary, the magistrate may be tempted to show unwarranted deference (or reliance) on the advocate before him, who is interested only in conducting a search or making an arrest. The magistrate may display a tendency to lean heavily in favor of the policeman or prosecutor, if the magistrate and the law enforcement official are personally acquainted, a clear possibility in many warrant proceedings. The combination of these factors may then lead the magistrate to make a hurried, if not uncaring, analysis of probable cause; on other occasions, the magistrate may act simply as a "rubber stamp," abdicating completely his obligation to determine whether a warrant should issue. *State* v. *Upchurch*, 267 N.C. 417, 148 S.E.2d 259 (1966).*

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* In *Upchurch*, the magistrate simply delegated the task of entertaining an application for a search warrant to a clerk, who acknowledged that he went along with whatever the police requested. Clearly, as exemplified by *Upchurch*, giving the magistrate the final word on the police's entitlement to a search warrant would seriously dilute Fourth Amendment rights.

Accordingly, we need not address Petitioner's argument in favor of the Court's adopting a more flexible approach to the question of probable cause [*United States* v. *Harris, supra*], nor the arguments that doubts in warrant cases should be resolved in the magistrate's favor [*United States* v. *Ventresca, supra*] or that the decisions of the magistrate should not, in effect, be scrutinized under a magnifying glass. Irrespective of these considerations, it must be acknowledged that when, under the most lenient, flexible standards of judicial review, the magistrate has committed an unconstitutional error in issuing a search warrant, the error must be recognized and be the subject of appropriate relief under the exclusionary rule. Otherwise, the magistrate's unconstitutional determination will be permitted to control the outcome of a criminal proceeding. To let the magistrate's decision on the propriety of the issuance of a search warrant constitute the final word on an important Fourth Amendment issue would be to provide the magistrate with unprecedented power. We are aware of no other area in which a judicial officer is vested with the authority to issue unreviewable and binding interpretations of the Constitution.*

Indeed, the exclusionary sanction remains appropriate even in the situation where evidence is found in execution of a warrant later determined to have been improperly issued by the magistrate. As Professor LaFave has noted in support of excluding such evidence procured in reliance on a facially valid warrant:

---

* That the exclusionary rule deters magistrates from deciding warrant applications incorrectly cannot be doubted. Retention of the rule obviously will provide continued incentive to the magistrate, insofar as he is capable of understanding and determining the question of probable cause [*Shadwick* v. *City of Tampa, supra*], to apply what he learns from reading appellate decisions dealing with search warrants to future warrant applications brought before him.

> Once again, it is necessary to begin with the right question, which is whether admitting the evidence in such instances would create an additional incentive to infringe upon Fourth Amendment rights. I see no basis for assuming the answer to be other than yes. Empirical studies have shown that "police 'shop around' for a magistrate who is lenient" (footnote omitted) and that there is "substantial disparity between magistrates as to how much evidence is required to obtain a search warrant." (footnote omitted). Just recently a leading *opponent* of the exclusionary rule has expressed "no doubt" that "judges do misconstrue the Fourth Amendment and fudge the standards of probable cause, all in what they consider to be the overall good of justice and the community." [citing M. Wilkey, *A Call for Alternatives to the Exclusionary Rule,* 62 Jud. 351, 356 (1979)] Thus, I am not sanguine about what would happen if both police and magistrates knew that whatever search and seizure activity was authorized by a warrant could in no way be challenged in a criminal prosecution. Withdrawal of the exclusionary rule in this context, therefore, could hardly be called progress. . . .
>
> W. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith",* 43 Univ. Pitt. L. Rev. 307, 353-54 (1982) (emphasis in original).

As Professor Amsterdam has noted in this context:

> On the one hand is the recognition that restrictions upon means of law enforcement handicap society's capacity to deal with two of its most deeply disturbing problems: the fact and the fear of crime. . . . It was, after all, Learned Hand who admonished us that "[w]hat we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and

> defeats the prosecution of crime." (Citation omitted). On the other hand, it was Mr. Justice Frankfurter—no watery sentimentalist—who reminded us that "[t]he history of liberty has largely been the history of observance of procedural safeguards." (Citations omitted). And the history of the destruction of liberty, one may add, has largely been the history of the relaxation of those safeguards in the face of plausible-sounding governmental claims of a need to deal with widely frightening and emotion-freighted threats to the good order of society.
>
> Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 354 (1974).

The Court must adhere to an objective standard in evaluating the bona fides of police officers conducting searches and seizures and of magistrates who issue warrants. That standard is probable cause based upon objective, clearly articulable criteria. To allow anything less would be tantamount to eviscerating the probable cause requirement from the very text of the Fourth Amendment itself.

Conclusion

The judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

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THE STATE OF ILLINOIS,

Petitioner,

—v.—

LANCE and SUSAN GATES,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

~~MOTION OF DAN JOHNSTON, COUNTY ATTORNEY, POLK COUNTY, IOWA, FOR LEAVE TO FILE AND~~ BRIEF *AMICUS CURIAE* OPPOSING THE ESTABLISHMENT OF A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE

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IN THE

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Amicus Curiae is the duly elected County Attorney of Polk County, Iowa, encompassing the City of Des Moines. *Amicus* has principal responsibility for the prosecution of criminal offenders in Polk County, Iowa. As a law enforcement official, *amicus* opposes the introduction of a good faith defense to the exclusionary rule. In the day to day administration of criminal justice, *amicus* views the exclusionary rule as a significant—indeed, the only significant—mechanism for assuring that Fourth Amendment values are respected. *Amicus* has not found the exclusionary rule a serious impediment in prosecuting the guilty. Rather, the rule has fostered police professionalism. *Amicus* believes that the recognition of a good faith defense to the exclusionary rule would inject extremely difficult factual issues into the criminal justice system which would

increase the resources needed to dispose of a case, while reducing the degree of constitutional protection available to the public. Finally, *amicus* also believes that a misplaced emphasis on the exclusionary rule and other constitutional rights in the effort to reduce crime, diverts attention from areas, such as prison reform, which would, in fact, reduce crime. Since, in the opinion of *amicus*, the exclusionary rule serves a critical educational and prophylactic function without posing a serious threat to the prosecution of crime; and since the recognition of a good faith defense would weaken constitutional liberties without alleviating the nation's crime problem, *amicus* respectfully seeks leave to file a brief *amicus curiae* opposing the establishment of a good faith defense to the exclusionary rule.

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INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* is set forth in the foregoing motion.

ARGUMENT

Two former members of this Court served as law enforcement officials for substantial periods of time before their respective appointments. Chief Justice Warren served more years as a state prosecutor than any Justice in the Nations' history. Justice Clark served as Assistant Attorney General in charge of the Criminal Division of the Department of Justice and as Attorney General. Each harbored initial skepticism concerning the exclusionary rule. Yet Chief Justice Warren joined Justice Clark in *Mapp* v. *Ohio,* 367 U.S. 643 (1961) because both recognized that the exclusionary rule had not adversely affected their ability to prosecute crime, while providing a critical reinforcement of Fourth Amendment values. Just as Justices Warren and Clark came to understand, in part through their experiences as prosecutors, the central role played by the exclusionary rule in establishing respect for the Fourth Amendment within the law enforcement community, *amicus,* as a modern-day prosecutor, supports the exclusionary rule as a linchpin of enlightened and effective law enforcement.

I. THE EXCLUSIONARY RULE DOES NOT ACT AS A SUBSTANTIAL IMPEDIMENT TO THE CONVICTION OF THE GUILTY

The experience of *amicus* reflects the fact that the exclusionary rule does not cause the dismissal of a substantial number of cases. Of the 6,487 cases prosecuted by *amicus* since July 198[illegible], only 13 have been dismissed because of the operation of the exclusionary rule and, of that 13, 9 involved allegations of possession of narcotics. As law enforcement

authorities have gained a greater understanding of their responsibilities under the Fourth Amendment—in large part because of the pressures generated by the exclusionary rule—the incidence of Fourth Amendment violation has steadily decreased until, today, it does not play a substantial role in the prosecution of crimes against persons or property. *See* W. LaFave, *Search and Seizure,* § 1.2, n.9. (1981 Supp.); Brosi, *A Cross-City Comparison of Felony Case Processing* (INSLAW 1979).[1] Indeed, if the exclusionary rule can be said to have any effect on the prosecution of crime, it is largely in the area of narcotics prosecutions involving allegations of unlawful possession.[2] Even in that area, moreover, *amicus* has found it possible to conduct effective law enforcement without resorting to violations of the Fourth Amendment. It would, *amicus* submits, be an act of folly to weaken our fundamental constitutional protections by tampering with the exclusionary rule in the absence of any showing that it is adversely affecting our ability to prosecute the guilty. To the contrary, *amicus* has found that the existence of the exclusionary rule has fostered a degree of professionalism in our police departments which has led to superior police work and an unmistakable capacity to provide effective law enforcement while respecting Fourth Amendment values.

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1 Even the Justice Department Study, financed for the purpose of supporting the Administration's assault on the exclusionary rule, shows that only .08 percent of felony complaints in California were rejected on exclusionary rule grounds.

2 For example, 83 percent of all exclusionary rule cases in New Orleans were narcotics prosecutions.

II. THE EXCLUSIONARY RULE IS NECESSARY TO EMPHASIZE THE SERIOUSNESS OF OUR SOCIETY'S COMMITMENT TO FOURTH AMENDMENT VALUES

Police officers receive conflicting signals from the community. On the one hand, they are subjected to enormous—and understandable—pressures to prevent crime and to apprehend criminals; on the other hand, they are sternly admonished to conform their official behavior to limits established by the Bill of Rights. As with any group receiving conflicting signals, a suspicion may exist that one signal is to be ignored in the pursuit of the other. In the years prior to *Mapp*, the routine acceptance and use by the courts of evidence gathered in violation of the Bill of Rights fostered the impression among segments of the law enforcement community that only lip service need be paid to the restraining signals emanating from the Bill of Rights. The announcement by the Court in *Mapp* that the Fourth Amendment must be taken seriously was, thus, more than the mere establishment of a deterrent; it was a reinforcement and amplification of the signal that law enforcement in a free society is more complex than merely capturing the guilty. It was a firm admonition that even a worthy law enforcement end cannot justify an unconstitutional means. In the twenty-two years since *Mapp*, a generation of police officers has come to maturity in America, trained to recognize both sets of signals as meriting serious attention. It would constitute a law enforcement tragedy of the highest proportions if this Court were to weaken the signals which flow from the Bill of Rights when we are so close to achieving a professionalized law enforcement community.

This Court should harbor no illusions as to the psychological impact of a retreat from *Mapp*, whether couched in the rubric of good faith or some other protective wrapping. The signal to the law enforcement community, whether or not intended, would be a palpable one—we no longer take the Fourth Amendment as seriously. The inevitable result of such a signal

must be a quantum upsurge in conduct violative of the Fourth Amendment. *Amicus* earnestly urges the Court not to send such a signal in the absence of persuasive evidence that the exclusionary rule as currently administered in fact constitutes an impediment to the prosecution of crime.

III. RECOGNITION OF A GOOD FAITH DEFENSE TO THE EXCLUSIONARY RULE WOULD INTRODUCE UNNECESSARY COMPLEXITY INTO THE CRIMINAL PROCESS AND WOULD ENCOURAGE POLICE TO REMAIN IGNORANT OF EVOLVING FOURTH AMENDMENT DOCTRINE

A. The Good Faith Defense is Administratively Unworkable

As this Court has seen, the administration of a good faith defense is both time consuming and necessarily inexact. Thus, in grappling with the problems posed by a good faith defense to an action for damages for the violation of constitutional rights, this Court has been forced to consider, *inter alia*, allocation of the production and persuasion burdens, definition of the substantive standard, the probative force of relevant evidence and the possibility of derivative liability.

Even more difficult issues will be posed in the context of a suppression hearing where the central issue will become, not the substantive meaning of the Fourth Amendment, but the objective good faith of the officer. As the Solicitor General correctly notes, it is, occasionally, a difficult task to determine what the Fourth Amendment requires, despite the matrix of precedent in which a case is embedded. It would, however, be far more difficult—indeed it would be impossible—to venture into wholly uncharted waters and explore the objective good faith of the officer. Every suppression hearing would necessarily become an inquiry into the training and knowledge of the arresting officer, to say nothing of the extent to which he had committed prior violations of the Fourth Amendment. The

results would be wholly unpredictable and would require an extraordinary investment in time and resources.

B. The Good Faith Defense Places a Premium on Ignorance

Under current standards, when this Court announces a clarification of Fourth Amendment doctrine—for example, the decision in *Delaware* v. *Prouse*, 440 U.S. 648 (1979), clarifying the extent to which searches of automobiles could take place—police officers possess a powerful incentive to understand the clarified rule in order to assure that their investigative practices do not violate the Fourth Amendment. Not surprisingly, therefore, the existence of the exclusionary rule has stimulated an extraordinary attempt by police officers to master Fourth Amendment doctrine. If, however, illegally seized evidence is admissible so long as the officer acted in good faith, police officials might well be better served by ignoring the complexities of Fourth Amendment doctrine, trusting instead in their good faith to validate their investigative methods. Thus, if in the wake of *Delaware* v. *Prouse*, a police department studiously ignored the implications of the opinion, a police officer conducting a search in violation of that case might nevertheless be acting in good faith because he had never been informed of the case. While the notion of objective reasonableness places limits on willful ignorance, a good faith defense would place a premium on providing as little training as possible to satisfy minimum objective standards. Any additional training would be correctly perceived as creating unnecessary problems for the police. See Kaplan, *The Limits of the Exlusionary Rule*, 26 Stan L. Rev. 1027, 1044 (1971). See also, American Law Institute, 48th Annual Meeting, pp. 374-98 (1971).

CONCLUSION

For the above-stated reasons, this Court should reject the suggestion that illegally seized evidence may be admitted so long as it was seized in good faith.

Respectfully submitted

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Amicus Brief

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BRIEF AMICI CURIAE OF SEVEN FORMER MEMBERS OF THE ATTORNEY GENERAL OF THE UNITED STATES' TASK FORCE ON VIOLENT CRIME (1981), *ET AL*, IN SUPPORT OF THE STATE OF ILLINOIS

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This brief is filed pursuant to Rule 36 of the Rules of the Supreme Court of the United States. Counsel for Petitioner and Respondents have given their consent to this filing. Letters to this effect have been lodged with the Clerk of the Court.

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INTEREST OF AMICI CURIAE

The question of the history, impact on the criminal justice system, current application and future, of the Exclusionary Rule has been one of the most controversial issues in criminal justice in America for years. There are those who believe that the Rule is necessary to deter unlawful police conduct. Others believe that the Rule does not (and can not) accomplish its deterrent purpose, and that it exacts far too high a price from society to continue its existence. *Amici* fall in the latter category.

Amici herein, in addition to lead *amicus*: Seven Former Members of the Attorney General of the United States' Task Force on Violent Crime (1981), consist primarily of law enforcement groups (outside of government); public interest law groups, centers, and research and educational organizations with a legitimate and demonstrated concern for criminal justice issues. Other *amici* have shared the same concern.

Because of the very large number of *amici**, their interest will be described in terms of the above classifications unless it is appropriate to specify.

Seven Former Members of the Attorney General of the United States Task Force on Violent Crime (1981).

On April 10, 1981 the Attorney General of the United States, the Honorable William French Smith, convened a Task Force on Violent Crime. The overall objective of the Task Force was to make specific recommendations to the Attorney General on ways in which the federal government could do more to combat violent crime.

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* When this case was set for re-argument, the Chief Deputy Clerk of the Supreme Court suggested to Counsel for *amici curiae* that the receipt of a large number of *amicus curiae* briefs would be an imposition on this Court's busy schedule and further suggested that, if possible, the views of as many *amici* as possible be consolidated in a single brief. This is the reason for the unusual number of *amici* herein.

Members of the Task Force were:

Honorable Griffin B. Bell, Esq., Former Attorney General of the United States; Former Judge, U.S. Court of Appeals for the Fifth Circuit, Co-Chairman.

Honorable James R. Thompson, Esq., Governor of Illinois, Co-chairman.

Honorable David L. Armstrong, Esq., District Attorney Jefferson County (Louisville) Kentucky.

Frank G. Carrington, Esq., Executive Director, Crime Victims Legal Organization. (Counsel for *Amici Curiae*).

Robert L. Edwards, Director, Local Law Enforcement Assistance, Florida Department of Law Enforcement.

William L. Hart, Chief of Police, Detroit, Michigan.

Honorable Wilbur F. Littlefield, Public Defender, Los Angeles County.

Professor James Q. Wilson, School of Government, Harvard University.

One of the recommendations (No. 40) made to the Attorney General by the Task Force read, in pertinent part:

> In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution . . . We recommend that the Attorney General instruct United States Attorneys and the Solicitor General to urge this rule in appropriate court proceedings, or support federal legislation establishing this rule, or both.*

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* Mr. Littlefield dissented from this recommendation; hence, his name is not associated with this brief. The Seven Members in the majority were Messrs: Bell, Thompson, Armstrong, Carrington, Edwards, Hart and Wilson, all of whom have requested that their name be associated with this brief.

The Task Force ended on August 17, 1981, when it delivered its Final Report to the Attorney General; thus, we are not filing as an official government body but rather as an ad-hoc group of *former* members. We hope, however, that, having taken lengthy testimony about the Rule during our hearings, we might be able to assist this Court in reaching its conclusion. Co-counsel for *amici curiae*, Clifford J. Ingber, Esq. and George W. Nicholson, Esq., while not members of the Task Force, assisted materially in the preparation of this brief.

The Law Enforcement Oriented Groups, associated as *amici* are those which represent law enforcement officers through organizations designed to promote and foster police professionalism on the national and state levels. They are the: International Association of Chiefs of Police, Inc.; National Sheriffs' Association; Association of Federal Investigation, Inc.; National Troopers Coalition, Federal Criminal Investigators Association, Fraternal Order of Police, and the Society of Former Special Agents of the Federal Bureau of Investigation, Inc. on the national level; and the: Florida Association of Police Attorneys, Inc.; Florida Police Chiefs Association, Inc.; Florida Sheriffs Association; Florida State Chapter, Fraternal Order of Police; North Carolina Sheriffs Association; Southwestern Law Enforcement Institute, Inc., and San Antonio Police Officers Association, Inc. on the state and local level.

Public Interest Law Centers.

A number of such centers, foundations and other organizations who engage in research, education and public information on criminal justice matters are *co-amici* on this brief. They are: Americans for Effective Law Enforcement, Inc.; Criminal Justice Legal Foundation, Inc.; Free Congress Research and Education Foundation, Inc.; Gulf and Great Plains Legal Foundation, Inc.; Mountain States Legal Foundation, Inc.; Pacific Legal Foundation, Inc.; South Eastern Legal Foundation, Inc.; and Victims' Assistance Legal Organization, Inc.

Other Co-Amici:

Hon. Rufus L. Edmisten, Esq., Attorney General, State of North Carolina.

David S. Crump, Esq., Deputy Attorney General.

Victims Rights Advocacy Project, University of Virginia Law School.

All *amici* share the common interest of wishing to assist in the improvement of the efficacy of the criminal justice system without denigrating the *fundamental* rights of the accused. We believe that the absolute application of the Exclusionary Rule has kept the system "out of balance" for years. Our interest lies primarily in urging this Court to restore a balance in the search and seizure area through adoption of a "good faith exception" to the Rule.

ARGUMENT

Amici are convinced that this Court has heard, or certainly will hear, during the briefing of this case, almost every conceivable argument, as to why the absolute application of the:

> . . . rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.[1]

Consequently, *amici* will not reiterate the legal arguments made by the State of Illinois or co-*amici* in support thereof, although we agree with them and wish to associate ourselves with them.

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1 Order for Reargument, *Illinois v. Gates*, No. 81-430, October Term, 1981, ____ U.S. ____, 32 Cr.L. 4069, December 1, 1982 (argument heard previously, October 13, 1982, 32 Cr.L. 4051).

This brief will concern itself with a single point, one that, rather surprisingly, has never, to our knowledge, been fully developed before this Court in prior cases. This point is simply that, based on principles of logic and common sense, and in view of the acknowledged fact that the law of search and seizure has become so complex that *no one* seems to understand it, the suppression doctrine does not, and *can* not, deter "illegal" police searches and seizures, especially those made in good faith. Hence, given the extreme cost to the criminal justice system (and to the public's perception of the system), the good-faith exception should be utilized by this Court to modify the absolute application of the Exclusionary Rule which is currently in effect.

I. LOGIC AND COMMON SENSE DICTATE THAT THE EXCLUSIONARY RULE DOES NOT, AND CAN NOT DETER POLICE ACTIVITY. TAKEN IN GOOD FAITH IN THE AREA OF ARREST, SEARCH AND SEIZURE; THUS, THIS COURT'S ADOPTION OF A "GOOD-FAITH EXCEPTION" TO THE ABSOLUTE APPLICATION OF THE EXCLUSIONARY RULE WOULD BE ENTIRELY APPROPRIATE.

The application of the Exclusionary Rule has, historically, been premised on two main grounds: deterrence of Fourth Amendment violations through the suppression of evidence so obtained, and the "imperative of judicial integrity" to the effect that the admission of such evidence would contaminate the judicial process.[2]

Amici will not dwell on the "imperative of judicial integrity" question. This is primarily a legal issue which we do not intend to reargue; and, in any event, we believe that the long line of cases in which this Court, in recent years, has refused to

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2 For example, Mr. Justice Powell analysed both the bases of the Exclusionary Rule in *Stone v. Powell, Wolff v. Rice*, 428 U.S. 465, at 486.

expand the application of the Exclusionary Rule is dispositive of the issue.[3]

The principal issue, then, becomes the one of deterrence; and, we submit that if the concept of deterrence of "illegal" police conduct falls, then the entire argument for the absolute application of the Exclusionary Rule must ultimately fall.

Chief Justice Burger, in his dissenting opinion in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) stated flatly that ". . . there is no empirical evidence to support the claim that the rule deters illegal conduct of police officers", at, 416.[4]

Amici agree with the foregoing assertion by the Chief Justice because it is true; however, we would go one step further and advance a theory, based upon principles of logic and common sense, that the rationale of deterrence in most search and seizure cases cannot be substantiated.

Proponents of the principle of deterrence are, at the outset, in the position of having to prove a negative. Deterrence, by its very definition,[5] presupposes *non*-action on the part of the

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3 *E.g.*: *United States v. Calandra*, 414 U.S. 338 (1974), grand juries, *Stone v. Powell*, 428 U.S. 465 (1976), *hapeas corpus* petitions; *United States v. Janis*, 428 U.S. 433 (1976), federal civil proceedings; *Michigan v. De Fillipo*, 443 U.S. 31 (1979), evidence seized by city police officers under an ordinance subsequently declared invalid.

4 There is, however, *some* empirical evidence of *non*-deterrence of police "misconduct" by the Exclusionary Rule; see: Oaks, "Studying the Exclusionary Rule in Search and Seizure", 37 *U. Chi. L. Rev.* 665 (1970); Spiotto, "Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives", 2 *Journal of Legal Studies* 243 (1973); see, generally: Wilkey (Malcolm R., Judge, United States Court of Appeals for the District of Columbia Circuit), "The Exclusionary Rule: Should the Criminal Go Free Because the Constable Has Blundered?" 62 *Judicature*, No. 5, 215, November 1978. Judge Wilkey also points out that no other nation in the free world has engrafted the Exclusionary Rule onto its criminal justice system; *id*, at 216.

5 "Deterrence" is grafted as: "the act or process of deterring"; the antecedent definition of the work "deter" is: "to turn aside, dis-

person deterred, or to be deterred. In turn, non-action can never lead to an event which if it *had* occurred, could statistically be correlated, consequently, any claim made by the proponents of the Exclusionary Rule of *lack* of evidence of non-deterrence can never rise to the level of evidence of deterrence.

If the proponents of the deterrent effect of the Exclusionary Rule cannot prove their case, the next question becomes whether, as a matter of logic or common sense, the application of the Exclusionary Rule *can ever* deter police officers who act in good faith. *Amici* suggest that it can not for the following reasons.

A. A Person Can Not Be Deterred From Doing Something If He Is Not Aware With Reasonable Certainty, What It Is That He Is To Be Deterred From Doing.

The law of arrest, search and seizure, stop-and-frisk, and, indeed, the law involving almost any other criminal/Constitutional issue has become so confused, complex, convoluted and contradictory that the law enforcement officer on the street, despite his desire to conform to the requirements of the Fourth Amendment and other Constitutional principles, literally cannot know what is being demanded of him (or her) from one day to the next.[6]

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courage, or prevent from acting (as by fear)" *Webster's Seventh New Collegiate Dictionary* (Springfield, MA, G. C. Merriam Company, 1961) at 226.

6 This was recognized even by the late Justice Tom C. Clark, *who wrote the majority opinion in Mapp, supra*:

> Every moment of every day, somewhere in the United States, a law enforcement officer is faced with a problem of search and seizure. *He is anxious to obey the rules that circumscribe his conduct in this field.* It is the duty of this Court to lay down those rules with such clarity and understanding that he may be able to understand them.
>
> It is disastrous to law enforcement to leave at large the inconsistent rules laid down in "seach and seizure" cases. It turns the wellspring of democracy, law and order, into a slough of frustra-

This is a rather sweeping assertion; however, *amici* believe that we can support it with solid evidence, not the least of which emanates from the extremely divergent rulings and from the public pronouncements made by members of this Court.

Consider, for example, the syllabus in *Rose v. Lundy,* 102 S.Ct. 1198 (1982), a *habeas corpus* case:

> O'Connor, J. announced the Court's judgment and delivered an opinion of the Court with respect to Parts I, II, III-A, III-B and IV, in which Burger, C.J., Marshall, Powell and Rehnquist, J.J. joined an opinion with respect to Part III-C in which Burger, C.J. and Powell and Rehnquist, J.J. joined.
>
> Blackmun, J., filed an opinion concurring in the judgment.
>
> Brennan, J., filed an opinion concurring in part and dissenting in part in which Marshall, J. joined. White, J. filed an opinion concurring in part and dissenting in part.
>
> Stevens, J., filed a dissenting opinion. 102 S.Ct. 1213.

This caused Mr. Fred Barbash, the Supreme Court reporter for the *Washington Post* to write:

> Indeed, even some of the justices expressed concern on that case that the Court, in broad areas like equal protection and due process wasn't making much sense. "Our opinions in this area are often criticized, with justice, as lacking consistency and clarity," said Justice Lewis F. Powell, Jr., joined by Justice William H. Rehnquist in a concurrence with Blackmun . . . "Unnecessarily broad

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tion. It turns crime detection into a game of "cops and robbers". We hear much these days of an increase in crime and a breakdown in law enforcement, some blame this on police officers. I say that there are others who must shoulder much of that responsibility. *Chapman v. United States,* 365 U.S. 610 (1961), at 622, Clark, J., dissenting. (Emphasis supplied).

> statements of doctrine frequently do more to confuse than to clarify our jurisprudence," Powell said.[7]

Amici cite this in order to indicate that even the Justices themselves are beginning to recognize that there is an enormous amount of confusion in criminal/Constitutional jurisprudence. We do *not* endorse Mr. Barbash's statement that the Court ". . . wasn't making much sense". On the contrary, it might be said that the members of the Court were making *too much* sense, as it were; because each separate opinion, concurring, dissenting, or both, is carefully thought out and well-reasoned from the point of view of the Justice writing.

Nothing stated in this brief is meant to be critical of the Court; indeed, in the view of *amici,* the Justices, charged with the interpretation of the Constitution of the United States, would be deficient in their duties were they not to express their opinions forcibly. The point that we are making is simply that the net result of these divergences of opinion creates a highly confusing situation for those who must apply, and, at the same time adhere to, the Court's holdings: in this case law enforcement officers, operating on a day-to-day basis. This confusion, inevitable when it comes to Constitutional interpretation, is, we submit, precisely the basis upon which the good-faith exception to the Exclusionary Rule can, and should, be premised.

Turning to the specific area of arrest and search and seizure, we cite two other cases, one in which this Court suppressed evidence and one in which it upheld the police action in question.

Coolidge v. New Hampshire, 403 U.S. 443 (1971) reversed a murder conviction. The syllabus reads:

> Mr. Justice Harlan concurred in parts of the opinion and in the judgment and filed an opinion. Mr. Justice

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7 Fred Barbash, "Supreme Courts Opinions Keep Flying in Nine Directions", *Washington Post,* March 4, 1982, p. 17.

> Black concurred in part and dissented in part in which Mr. Justice Blackmun in parts II and III and portion of part I. Mr. Justice White concurred in part and dissented in part in which Mr. Chief Justice Burger joined. Mr. Chief Justice Burger dissented in part and concurred in part and filed opinion. 403 U.S. at 443.

United States v. Mendenhall, 446 U.S. 554 (1980) affirmed the conviction of a drug suspect. The syllabus reads:

> Stewart, J. announced the Court's judgment and delivered an opinion of the Court with respect to parts I, II-B, II-C and III, in which Burger, C.J., and Blackmun, Powell, and Rehnquist, J., joined. Powell, J., filed an opinion concurring in part and concurring in the judgment, in which Burger, C.J., and Blackmun, J. joined. White, J., filed a dissenting opinion in which Brennan, Marshall, and Stevens, J.J., joined. 446 U.S. at 554.

Amici submit that, when the Justices of the Supreme Court of the United States not only have divergent views about the *outcome* of a search and seizure case (*Coolidge* and *Mendenhall* were both decided by 5-to-4 pluralities), but then go on to disagree over parts and *sub-parts* of a ruling, it is unrealistic, and perhaps even unfair, to expect that a law enforcement officer, on the street (almost invariably a non-lawyer), acting under the exigencies that are inherent in police work, should be held to a superior standard of knowledge of such niceties of search and seizure law as have split the Justices of this Court in the manner described above.

Mr. Justice Rehnquist, dissenting in *Steagald v. United States*, 101 S.Ct. 1642 (1981), in which this Court suppressed evidence of narcotics which were discovered, in plain view, by federal officers who had entered Steagald's home, armed with an arrest warrant for a federal fugitive (Lyons), summed up the uncertainty that confronts police officers and others involved in the enforcement of the criminal law:

> The genuinely unfortunate aspect of today's ruling is not that fewer fugitives will be brought to book, or fewer criminals apprehended, though both of these consequences will undoubtedly occur; the greater misfortune is the increased uncertainty imposed on police officers in the field, committing magistrates, and trial judges, who must confront variations and premutations of this factual situation on a day-to-day basis. They will, in their various capacities, have to weigh the time during which a suspect for whom there is an outstanding arrest warrant has been in the building, whether the dwelling is the suspect's home, how long he has lived there, whether he is likely to leave immediately, and a number of related and equally imponderable questions. Certainty and repose, as Justice Holmes said, may not be the destiny of man, but one might have hoped for a higher degree of certainty in this one narrow but important area of the law than is offered by today's decision. 101 S.Ct. at 1657.

Given the confused and contradictory nature of the law of search and seizure, *amici* submit that police officers are in the unenviable position of putatively being deterred, by the suppression doctrine, while, at the same time not knowing with any clarity at all what they are to be deterred from doing. This results in a situation which comes close to being a logical impossibility.

To this must be added what might be called the "pyramid effect", meaning that, every time that this Court hands down a search and seizure decision, that decision stands at the apex of our jurisprudence. The given decision then will be interpreted by federal courts of appeal, federal district courts, state supreme courts, state appellate courts and state trial courts with as many different sub-interpretations as there are individuals sitting on such lower courts, spreading out from these hundreds of courts, to form the base of the pyramid of search and

seizure rulings sitting firmly on the back of the law enforcement officer who must apply them.[8]

B. A Person Cannot Be Deterred From Doing Something If He Believes At The Time He Does It That His Conduct Is Lawful.

Any law enforcement officer confronted with a search and seizure question can have only one of two states of mind: 1) he knows that what he is doing is illegal; or, 2) he *believes*,[9] in good-faith, that what he is doing is legal.

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8 This "pyramid effect" can be illustrated by the fact that Shepard's United States Citations, Fifth Edition, Case Edition Supplement 1971-1976, Volume 4, lists 42 entries from the U.S. Reports, and approximately 1200 lower court case citations from *Mapp v. Ohio, alone*, at 372. For the period 1976-1980, Volume 5, there were 9 U.S. citations and approxiamtely 611 lower court citations to *Mapp*, at 261.

Amici are cognizant of the fact that not every Shepard's entry involves a detailed analysis of the case reported; we do submit, however, that the sheer volume of cases citing *Mapp* is evidence of our contention that there will almost invariably have been *some* question of search and seizure involved in the cases, and, in addition, is evidence that the pronouncements of this Court must inevitably spread downward through the lower courts, adding immeasurably to the confusion of law enforcement officers, and, indeed, of the courts themselves.

9 As noted, in some clearly, albeit narrowly-delineated cases, a policeman *can* know that he is doing wrong. He can, however, *never know* that he is doing the right thing because the absolute application of the Exclusionary Rule has, inherent it, the "changing of the rules in the middle of the game", and even the changing back, of rules.

For example, this Court, in 1981, decided two extremely complicated automobile search cases, *Belton v. New York*, 453 U.S. 454 (1981) and *Robbins v. California*, 453 U.S. 420 (1981). Then, in its next term, in *United States v. Ross*, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) it, in effect reversed *Robbins*.

Similarly, in *Johnson v. United States*, 102 S.Ct. 2579 (1982), this Court reversed a conviction by suppressing evidence that had been seized in good-faith during a search which was perfectly legal at the time it was made, because the Court decided to apply *Payton v. New York*, 445 U.S. 573 (1980) retrospectively.

Amici concede that the law of search and seizure is sufficiently clear in certain instances of *extremely* egrigious police conduct that such conduct is clearly prohibited: *e.g.* arrests at will of anyone who has previously been convicted of a crime, *Beck v. Ohio*, 397 U.S. 89 (1964); dragnet arrests of anyone who might be remotely suspected of a crime, *Davis v. Mississippi*, 394 U.S. 721 (1969); unreasonable "stop and frisks", *Sibron v. New York*, 392 U.S. 40 (1968); and searches that "shock the conscience", *Rochin v. California*, 342 U.S. 165 (1962). Decisions such as these set the *outer limits* of police conduct, or misconduct, and *amici* applaud them; they demonstrate, with some clarity, that there *are* limits beyond which even the most zealous policeman must not trespass.

Any officer who contravenes these laws should, perhaps, be disciplined; but it certainly will not be by the suppression of any evidence discovered, because the officer who has affirmatively proceeded, wilfully or with a wanton disregard of the consequences, to violate the Fourth Amendment in order to seize evidence has, by definition, not been in the slightest deterred by the threat of suppression of that evidence.

This leaves an entire class of cases, which, *amici* submit, are the greatest majority of search and seizure cases, in which the officer, confronted with the need to make a search and seizure decision on the spur of the moment, *and* confronted with a body of law that is as complex and confusing as has been described in the foregoing section of this brief, takes action because he or she *believes in good-faith* that probable cause for the action to be taken exists. This brings the logical argument expressed herein to its full circle; because, just as one cannot be deterred unless he knows what he is to be deterred from doing, so, also, one cannot be deterred from doing a wrongful

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We reiterate our point, made in text, that Constitutional law should never be static; in fact, this is our principal argument in support of the good-faith exception to the Exclusionary Rule; and, we submit, the *Ross* and *Johnson* decisions only go to support this position based on the theory of non-deterrence because of the complexity and ever-changing nature of the law.

act if he believes in reasonable good-faith that the act is not wrongful.

Mr. Justice White, dissenting in *Stone v. Powell*, 428 U.S. 465 (1976), characterized the lack of deterrent effect on reasonable, good-faith searches:

> When law enforcement personnel have acted mistakenly, but in good-faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth finding function of proceedings is substantially impaired or a trial totally aborted. 428 U.S., at 540.

Advocates of the Exclusionary Rule may postulate an "educational effect" of its application to future cases; however, as Chief Justice Burger pointed out in his dissenting opinion in *Bivens, supra*:

> Whatever educational effect the rule might conceivably have in theory is greatly diminished in fact by the realities of law enforcement work. Policemen do not have the time, inclination or training to read and grasp the nuances of appellate opinions that ultimately define the standards of conduct they are to follow. The issues that these decisions resolve often admit of neither easy nor obvious answers, as sharply divided courts on what is or is not "reasonable" amply demonstrate. Nor can judges, in all candor, forget that opinions sometimes lack helpful clarity. 403 U.S., at 417.

In summary, *amici* submit that most police actions in the search and seizure area are taken in good-faith, against a background of case law that is so confusing to judges, lawyers, laymen and police officers alike; consequently any action taken

by the officers which is not in demonstrable contravention of the "outer limit" type of cases, described above, must almost be *presumed* to have been taken in good-faith. Deterrence of police "misconduct", which is not perceived by the officer to be wrongful at the time that it is done, is also a logical impossibility.

C. In View Of This Lack Of Deterrence, The Costs Of The Exclusionary Rule To Our Criminal Justice System Are Too Much To Bear.

Even the most enthusiastic adherents of retention of the *status quo ante* of the Exclusionary Rule concede, as they must if they are addressing the matter realistically, that the absolute application of the Rule exacts a considerable price from society. This was expressed with commendable candor by the Honorable Stephen Sachs, Attorney General of the State of Maryland in Congressional testimony *against* any modification of the Rule:

> The rule is also very fragile, especially in today's atmosphere of understandable public outrage at crime and at our perceived inability to do much about it. It is vulnerable to attack because its values are abstract while its price is tangible. It frequently excludes hard evidence, the truth, from trial. It appears to reward the undeserving criminal, whom it frees because "the constable blundered". It seems to give aid and comfort only to the enemy in the war on crime. It makes almost no sense to citizens fed up with crime and impatient with legal "technicalities" who want to believe that crime would disappear if only courts would stop coddling criminals. That is why the rule, although it has plenty of responsible critics, has become a favorite whipping boy of anticrime rhetoricians.[10]

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10 Testimony of the Honorable Stephen H. Sachs: "The Exclusionary Bills"; Hearings Before the Subcommittee on Criminal Law, of the Committee on the Judiciary, United States Senate, Ninety-Seventh

This is a *very* forthright commentary when the source is considered, *i.e.* it comes from one who is making an evocative plea to the United States Senate *not* to modify the rule in the slightest. General Sachs has conceded that the Exclusionary Rule:

—suppresses the truth;

—frees the guilty;

—seems to benefit only ". . . the enemy in the war on crime"; and,

—is a major source of public disenchantment with our legal system.

A study published in December of 1982 by the National Institute of Justice, U.S. Justice Department, entitled "The Effects of the Exclusionary Rule: A Study in California" (hereinafter: NIJ Study) demonstrates some of the costs of the Rule on our society. The study examined all felony arrests rejected for prosecution because of search and seizure problems in California during the years 1976-1979; all felony cases rejected in San Diego County in 1980; and a sample of such rejections by the Los Angeles County District Attorneys in 1981. The study also traces the prior and subsequent criminal histories of defendants whose cases were dropped because of search and seizure problems. Key findings were:

Congress, First and Second Sessions; October 5, 1981, p. 33 (hereafter: "Hearings").

Others have commented on the costs of the Rule to the system. See: the majority opinion of Chief Justice Joseph Weintraub in *State v. Bisiccia,* 58 N.J. 586 (1971) about the costs to society of the Rule:

> When the truth is suppressed and the criminal is set free, the pain of suppression is felt, not by the inanimate state or by some penitent policeman, but by the offender's next victims for whose protection we hold office. In that direct way, *Mapp* denies the innocent the protection due them. 58 NJ, at 590,

and, Wilkey: "Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule", 9 FRD 211 (1982).

All felony cases rejected	
California, statewide (1976-1979)	4.8%
San Diego County (1980)	8.5%
Los Angeles, Pomona Co. (1981)	11.7%
Central Los Angeles (Sample-1981)	14.6%
Drug felony cases rejected	
California, statewide (1976-1979)	71.5%
San Diego County (1980)	74%
Los Angeles, Pomona Co. (1981)	32.5%
Central Los Angeles (Sample-1981)	29%

These examples deal with what is perhaps the most obvious defect of the Rule: "freeing the guilty". The NIJ study, however, goes one step farther (for the first time in our knowledge) and examined what the "guilty" did after they were freed. Insofar as the actual costs to society are concerned, the NIJ Study's data on *re*-arrests, paint a far more compelling picture of what the ultimate effects of the Rule, as currently applied, can be.

The study notes that:

> For most defendants, the arrest that ended in release because of the exclusionary rule was only a single incident in a longer criminal career. About half of those freed were rearrested during the follow-up period; they averaged approximately three rearrests each.
>
> 45.8 percent of the 2,141 defendants not prosecuted for felonies in California in 1976 and 1977 because of the exclusionary rule were rearrested within two years of their release. The 981 individuals who were rearrested accounted for 2,713 rearrests, 1,270 of which were for felony offenses.
>
> 52.4 percent of San Diego felony defendants not prosecuted in 1980 because of search and seizure problems

had been rearrested by October of 1982. Of those rearrested, 57.3 percent were rearrested more than once and 27.7 percent of those rearrested had four or more arrests during the follow-up period, which averaged 28 months.

69 percent of San Diego defendants released in 1980 because of search and seizure problems were found to have a prior or subsequent arrest record. Well over half (60 percent) had either a prior or subsequent *felony* arrest.

Amici submit that, in view of these costs, the proponents of the Exclusionary Rule have an extremely high burden of proof to bear in their advocacy of the principle that the Rule should be retained in its current absolute form. Deterrence of police misconduct would appear to be the sole rationale that the proponents can produce to conceivably offset such costs; and, if the arguments made herein that, logically, the Rule *can* not deter police actions taken in good-faith, are correct, then the costs of the Rule to society and to the criminal justice system, so far outweigh the gains that this Court should seriously modifying the Rule with a good-faith exception.

D. Recognition Of A Good-Faith Exception To The Absolute Strictures Of The Exclusionary Rule Is An Entirely Appropriate Way For This Court To Resolve The Dilemma Currently Associated With The Rule's Application.

The arguments made, and authority cited, in this brief prove, if nothing else, that the current application of the Exclusionary Rule which suppresses relevant and probative evidence of guilt is, at the very least, an extremely controversial legal doctrine. In our view, the controversy arises not so much over the *existence* of the Rule, but rather because of its absolute, immutable application to *every* search and seizure case, without regard to the gravity of the criminal offense or to the degree of police "misconduct" involved.

Mr. Chief Justice Burger, dissenting in *Bivens, supra,* made reference to the distinction between freeing a mouse or a tiger into a schoolroom, and this analogy is as apt today as it was in 1971. The Chief Justice reasoned:

> Although unfortunately ineffective, the Exclusionary Rule has increasingly been characterized by a single, monolithic and drastic judicial response to all official violations of legal norms. Inadvertent errors of judgment that do not work any grave injustice will ineritably occur under the pressures of police work. These honest mistakes have been treated in the same way as deliberate and flagrant *Irvine* type violations of the Fourth Amendment. 403 U.S., at 419.

and:

> I submit that society has at least as much right to expect rationally graded responses from judges in place of the universal "capital punishment" we inflict on all evidence when police error is shown in its acquisition . . . yet for over 55 years, and with increasing scope and intensity our legal system has treated vastly dissimilar cases as if they were the same. 403 U.S., at 419.

This language embodies the sum and substance of the instant case. While *amici* adhere to our position stated, *supra*, that the Exclusionary Rule is, logically, "unfortunately ineffective" as a deterrent to illegal police conduct, we do not suggest in this brief that the Rule should be completely abolished. We simply submit that the "good-faith exception" rationale provides an opportunity for this Court to approve "rationally graded responses" to "vastly dissimilar cases", as the Chief Justice suggested eleven years ago. In our opinion, such a ruling would negate much of the current criticism of the rule, alleviate a number of the flaws inherent therein (which are conceded even by the Rule's staunchest adherents), and enhance the public's perception of the criminal justice system as being what it should always have been: a dispassionate search for the truth.

The case that seems to have triggered the legal debate over the good-faith exception to the Exclusionary Rule was, *United States v. Williams,* 662 F.2d 839 (5th Cir., *en banc.* 1980), *cert. den.* 449 U.S. 1127 (1981). In this case the Fifth Circuit, held, *sua sponte* that:

> Henceforth in this Circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the Court so finds, it shall not apply the exclusionary rule to the evidence. 662 F.2d, at 847.

The Court in *Williams* also underscored the point made in section I (B), *supra*, of this brief:

> It makes no sense to speak of deterring police officers who acted in the good-faith belief that their conduct was *legal* by suppressing evidence derived from such actions unless we somehow wish to deter them from acting at all. 622 F.2d, at 842, (Emphasis in the original).

Amici will not reargue *Williams,* or other cases which have followed the same rationale,[11] except to state that, in our view, the good-faith exception presents this Court with a "middle ground" approach whereby the excesses of the absolute application of the Exclusionary Rule can be mitigated without doing violence to the *fundamental* Constitutional rights that the Fourth Amendment was designed to protect.

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11 *People v. Adams,* 442 N.E.2d 537 (Court of Appeals of New York, 1981); *Richmond v. Commonwealth,* 29 Cr.L. 2529 (Court of Appeals of Kentucky, 1981). *State v. Lehner,* 403 So.2d. 683 (La. 1981); *Gifford v. State,* 630 S.W.2d 387 (Tex. Crim. App. 1982). Other courts have expressed a feeling that they were persuaded by the reasoning in *Williams,* but believed themselves bound by the prior decision of the Supreme Court. *Holloman v. Commonwealth,* 275 S.E.2d 620 (Va. 1981), *Commonwealth v. Sheppard,* ____ N.E.2d ____, 32 Cr.L. 2158 (Mass. Oct. 26, 1982).

There are several points which are raised by the opponents of the "good-faith exception" which *Amici* would like to address, as briefly as possible, herein.

First, opponents of the "good-faith exception" have attempted to portray it as a relinquishment of any court's *objective* supervisory power over police action, in favor of slavishly admitting evidence whenever a law enforcement officer makes the bald assertion that he acted in *subjective* good-faith. Professor William Greenhalgh, Chairperson of the Criminal Justice Council of the American Bar Association, in Congressional testimony against any legislative adoption of a good-faith exception to the Exclusionary Rule, phrased his argument on this point, in pertinent part:

> Assuming, *arguendo,* that Congress should enact the *subjective* "good-faith" test to supplant the *objective* standard of reasonableness . . . (Emphasis in the original).[12]

Senator Charles Mathias, Chairman of the Subcommittee on Criminal Law, Committee on the Judiciary, United States Senate, during the hearings on this matter asked counsel for *amici curiae* in the instant case: "Good-faith is a subjective matter; isn't it?"[13] These observations by Professor Greenhalgh and Senator Mathias indicate that there is some confusion, even in the minds of people who deal with criminal justice matters at the highest level, as to what is meant by the "good-faith exception."

Amici would not endorse in this brief, or anywhere else, a doctrine that espoused the position that the *sole* test for the admissibility of evidence should rest upon the subjective belief of an officer that he had probable cause; obviously this could lead to abuses which, in turn, could erode Fourth Amendment guarantees. The plain fact of the matter is, however, that this is simply not the case.

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12 "Hearings", *op. cit. supra,* note 10, at 36.

13 *id.* at 117.

The basis for admission of evidence under the "good-faith exception" to the Exclusionary Rule is two-pronged. First, the officer or officers who made the search and seizure must assert that they believed in good-faith that they had probable cause. Next, and of far more importance, the trier of law or fact must find, *by an objective standard* that such belief was reasonable.

This was made abundantly clear by the *en banc* court in *Williams, supra*:

> Of course, the exception applies only if the police belief is *both* bona fide *and* reasonable. 622 F.2d at 843 (Emphasis in the original);

and this was reemphasized, with perhaps even greater clarity, by the New York Court of Appeals in *People v. Adams, supra*, in which the Court refused to suppress evidence seized in the mistaken but good-faith belief that someone consenting to a search had the legal right to do so:

> We emphasize that the police belief must be reasonable based upon an objective view of the circumstances present and not on the subjective belief of the searching officers. 442 N.E. 2d 537.[14]

Thus, the "good-faith exception" in no way grants police officers license knowingly to make an illegal search, and then blandly state that it should be upheld because they *subjectively* believed that it was reasonable. The "second prong" of the test, as enunciated by *Williams, supra*, and *Adams, supra*, whereby, the assertion of good-faith belief that probable cause existed must be reasonable by an *objective* standard, comports

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14 See also: *AELE Model State Statute*, Exclusionary Rule Limitations: Admissibility of evidence obtained as a result of an unlawful search and seizure. Adopted, July 14, 1982 by Americans for Effective Law Enforcement, Inc., 501 Grandview Dr., Suite 209, So. San Francisco, CA 94080 (415) 877-0731.

The AELE Model Statute stresses the Concept of reasonableness if evidence is to be admitted, thus engrafting the objective prong onto the officer's subjective good-faith as a condition precedent to admissibility.

entirely with the mandate of the Fourth Amendment which prohibits only *unreasonable* searches and seizures.

This leads to another point which we believe should be made, at least parenthetically. The *instant case* involves what might be called the epitome of good-faith police action: the securing of a facially valid search warrant from a "neutral and detached" magistrate. We suggest, as did the Violent Crime Task Force, that this should be *prima facie* evidence of good-faith; however, we believe that the good-faith exception should not be confined to search warrant cases. Certainly, the order for reargument in the instant case does not so confine the question.

Both *Williams, supra*, and *Adams, supra*, were non-search warrant cases involving police action that had to be taken immediately, *i.e.* the arrest of a suspected drug courier deplaning at an airport and the seizure of a firearm that had been used to menace the public. The Courts in both cases upheld the arrest and search because they were done in good-faith and were *reasonable*. We would hope that this Court would follow the same line of reasoning.

The "good-faith exception" merely adds some flexibility to the law, so that the truth of the matter must not *always* be suppressed in search and seizure situations; this is qualified, however, by the fact that the good-faith exception applies *only* so long as the officer can prove to the satisfaction of the judge that what he did was not undertaken with any intent to consciously or recklessly violate anyone's Constitutional rights; and the standard that the judge must utilize to determine this is clearly his objective view of the case rather than the subjective determination of the police officer.

CONCLUSION

Deterrence of "unlawful" police conduct is the sole ground that can be advanced for the continued viability of the Exclusionary Rule, at least in its current absolute applicability.

The proponents of the rule have produced no evidence of deterrence; to the contrary, logic and common sense dictate that any rule premised upon a situation as complex, conflicting and confusing as today's search and seizure law *can* not deter a policeman because he cannot know what it is that he is to be deterred from doing.

This is particularly true when, precisely because of this confusion in the law, the officer believes in good-faith (judged by an *objective* standard), that what he is doing is proper.

Given this, the costs to society of the absolute application of the rule far outweigh any perceptible gain.

The "good-faith" exception strikes a proper balance between these competing interests, and we urge the Court to adopt it.

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence obtained in the good faith, reasonable belief that the search and seizure at issue did not violate the Fourth Amendment.

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v.

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

The Court has requested supplemental briefing on the question whether the rule requiring the exclusion of evidence obtained in violation of the Fourth Amendment, which was first announced and applied to federal prosecutions in *Weeks* v. *United States*, 232 U.S. 383 (1914), should be modified. Few issues in the area of criminal law are of more profound importance to the United States. On the practical

level, questions regarding the proper interpretation of the Fourth Amendment and the concomitant application of the exclusionary rule are at the heart of countless federal prosecutions. And on the policy level, the extent to which the exclusionary rule is appropriately invoked is central to the fair and efficient administration of criminal justice. Accordingly, the United States has as substantial an interest in the outcome of this case as if it were a party.

SUMMARY OF ARGUMENT

1. Nothing in the Fourth Amendment or any other provision of the Constitution either directly or implicitly provides for the exclusion of illegally seized evidence from criminal trials. Instead, decisions of this Court over the last decade have made it clear that the exclusionary rule first enunciated in *Weeks* v. *United States*, 232 U.S. 383 (1914), and later extended to the states in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), is a judicially-created remedy, the paramount and perhaps sole purpose of which is the deterrence of unlawful police conduct. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 348 (1974); *Desist* v. *United States*, 394 U.S. 244, 254 n.24 (1969). As the deterrence rationale has achieved supremacy over earlier, now-discarded justifications for the rule, the Court has recognized that it makes sense to apply the rule only to those situations in which its deterrent purpose will in fact be significantly advanced. *Calandra*, 414 U.S. at 348. Accordingly, the Court now employs a cost-benefit analysis whenever it considers whether the rule should be applied to particular situations. When the costs of applying the rule are found to outweigh whatever deterrent effect it might achieve, the rule will not be imposed. See,

e.g., *United States* v. *Havens*, 446 U.S. 620 (1980); *United States* v. *Ceccolini*, 435 U.S. 268 (1978); *Stone* v. *Powell*, 428 U.S. 465 (1976); *Calandra*, 414 U.S. 338; *Alderman* v. *United States*, 394 U.S. 165 (1969).

2. After nearly 70 years of experience with the exclusionary rule, it is now appropriate to apply the same type of cost-benefit analysis in considering whether to adopt a "reasonable good-faith" exception to the existing rule. If, as we shall demonstrate in this brief, the benefits of applying the rule to certain classes of situations are outweighed by the costs, the Court should not hesitate to reformulate the rule. In our submission, a reasoned cost-benefit analysis of the exclusionary rule compels the conclusion that it should no longer be applied in those situations in which evidence is obtained in the reasonable good-faith belief that the search and seizure in question did not violate the Fourth Amendment, even if that belief later proves to have been mistaken. Preliminarily, however, we suggest that this is a situation ill-suited to a strictly even-handed weighing of costs and benefits. By excluding unquestionably relevant evidence, the exclusionary rule operates in precisely the opposite manner from what we demand of other rules of evidence. Thus, its benefits should not simply be presumed; they must, instead, be convincingly demonstrated if they are to overcome the indisputable costs. Accordingly, the exclusionary rule cannot rationally be retained in those circumstances where it is thought simply that it *might* produce some benefit. Similarly, the rule should not be retained merely because it appears that no better deterrent to police misconduct currently exists; the rule must carry its own weight through demonstrable evidence that it operates in the manner intended.

a. The principal benefit claimed for the exclusionary rule is its deterrent effect. Unfortunately for the proponents of the rule, however, its deterrent effect has never been proven by empirical evidence. And even if one accepts the intuitively plausible but unproven assumption that the rule is capable of deterring police misconduct to some extent, it is readily apparent as a matter of logic that the deterrent potential of the rule is drastically reduced, if not wholly eliminated, when it is invoked to suppress evidence obtained by a reasonably well-trained police officer in the belief that his conduct did not violate the Fourth Amendment.

The ineffectiveness of the rule as a deterrent device is particularly evident in cases such as the instant one, where police officers have done exactly what is demanded of them by obtaining a judicial search warrant and acting according to its terms. It is irrational to assume that police officers can be meaningfully deterred from future "unlawful" conduct when, at the time of the conduct in question, they had the authorization of a warrant obtained in the reasonable good-faith belief that there existed probable cause for the search and seizure in question. As has been often noted, the suppression of evidence that occurs when a higher court overturns a magistrate's finding of probable cause does not involve any police misconduct that needs to be deterred; all that is involved is disagreement among judges about subtle and ever-changing principles of law. There is no rational justification for applying the exclusionary rule to these situations, which bear not the slightest relationship to the egregious police misconduct for which the rule was first devised.

b. The presumed benefits of the exclusionary rule, which are virtually nonexistent in cases like the instant one, must be weighed against the rule's undeniable costs. Those costs are readily catalogued:

First, the exclusionary rule eliminates from consideration at trial the very type of evidence that is most relevant and trustworthy. The resulting distortion of the truth-finding process of adversary adjudication requires justification of the highest order.

Second, the rule benefits only those who otherwise would be found guilty; it allows "[t]he criminal * * * to go free because the constable has blundered." *People* v. *Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587. cert. denied, 270 U.S. 657 (1926). The available data demonstrate that the rule has a significant effect on the prosecution's ability to obtain convictions. Moreover, the effects of the rule are felt most heavily in drug cases involving defendants who, following dismissal of their narcotics charges because of the suppression of dispositive evidence, often go on to commit other crimes, frequently crimes of violence. The rule affords no remedy, however, for the innocent victims of unlawful police conduct, who are or should be the very persons most deserving of protection.

Third, and irrespective of the actual number of guilty defendants set free by virtue of the rule, its application necessarily exacts a high cost in diminished public respect for the judicial system. The public perception that there is something wrong with a system of criminal justice that frees guilty defendants on "technicalities" cannot lightly be ignored.

Fourth, and of particular relevance to the instant case, the rule lacks the essential ingredient of proportionality. It utterly fails to take into account the actual existence of police misconduct that is perceived

as such by the public and that is within the ambit of the proscriptions intended by the Framers of the Fourth Amendment. Behavior that a reasonably well-trained officer could not possibly be expected to know violated the Fourth Amendment is subject to the same Draconian "remedy" as the most flagrant abuse of police power.

Fifth, even granting for purposes of argument the premise that application of the rule to conduct close to the often indistinct boundary between lawful and unlawful searches would meaningfully deter some marginally improper police conduct (see *United States* v. *Johnson*, No. 80-1608 (June 21, 1982), slip op. 23-24), in this class of cases the rule is, almost by definition, as likely to deter proper as improper conduct. Thus, one of the gravest costs of relentless application of the rule to honest police mistakes is not merely that "the criminal * * * [shall] go free because the constable has blundered," but that the crime shall go undetected (or, worse, unprevented) because the exclusionary rule has deterred the officer from the *lawful* performance of his duties.

Sixth, the present rule places tremendous strains on the judicial system by encouraging the filing of suppression motions irrespective of whether there is even the slightest evidence of serious police misconduct. The windfall benefits of the rule to the guilty defendant are so overwhelming as to completely negate the process of self-screening and evaluation on the part of criminal defense counsel. A country whose judicial system is as seriously overloaded as ours can ill-afford the continued application of a rule that fosters such vast amounts of make-work.

Finally, the rule actually diminishes the Fourth Amendment by making judges reluctant to condemn

questionable practices because of the extreme consequences—total suppression of unquestionably relevant and frequently dispositive evidence.

c. The practical details relating to the operation of a "good faith" exception to the exclusionary rule are best left to future cases and initial development by lower courts. For now, it is sufficient to note that the most commonly-voiced objections to a good faith exception are lacking in substance. For example, it has been claimed that the exclusionary rule operates to ensure thorough police training in the requirements of the Fourth Amendment. But this benefit would not be lost by the adoption of a good-faith exception to the rule. Such an exception would not "put a premium on ignorance" because the reasonableness of a police officer's actions would be tested by the objective standard of what should be expected of the reasonably well-trained law enforcement official. Thus, a good-faith exception would preserve every incentive for police departments to ensure that their officers remain current with the development of Fourth Amendment law; indeed, the incentive for high-quality training might prove to be greater than it is now because the quality of police training could be an important factor in evaluating the reasonableness of a questioned search and seizure.

Moreover, the objective nature of the inquiry will protect the judicial system against unduly burdensome and generally irrelevant inquiries into the subjective state of mind of a particular officer. In most cases, a court will need to determine only whether a reasonably well-trained police officer should have known, in light of the extant principles of law, that his conduct was prohibited. The inquiry will thus not be markedly different from that required of a court in deciding a suppression motion.

It is also sometimes suggested that the exclusionary rule needs to be retained in its present form, or even expanded, so as not to "freeze" the development of Fourth Amendment law. Of course, it is not entirely clear that society is greatly benefited by having courts continue to decide every question that inventive lawyers can devise, particularly when "the general principles applicable to claims of Fourth Amendment violations are well settled * * *." *Arkansas* v. *Sanders*, 442 U.S. 753, 757 (1979). But, in any event, there need be no serious concern that adoption of a good-faith exception to the exclusionary rule would bring a halt to the adjudication of substantive Fourth Amendment issues. As demonstrated by the number of nonmeritorious suppression motions currently filed, criminal defendants can be counted upon to assert every defense available to them. Because the substantial windfall of exclusion would remain available to those defendants who could show unreasonable police conduct, it is unrealistic to assume that defendants with colorably meritorious claims of Fourth Amendment violations will lose their incentive to litigate (although we anticipate that there would be a considerable reduction in the number of frivolous claims).

There is, moreover, no jurisprudential impediment to a court's deciding a question of substantive Fourth Amendment law before determining the applicability in a particular case of a good-faith exception to the exclusionary rule. Whether to assume the existence of a Fourth Amendment violation and decide only the question of good faith, or whether to decide the substantive question first, should be left to judicial discretion. It might well be appropriate for courts to decline to adjudicate nonrecurring fact-bound questions concerning the propriety of a particular search and seizure if application of a good-faith exception

would be sufficient to dispose of the case. On the other hand, courts would remain free to decide significant unsettled questions of law or to adjudicate particularly problematic or recurring factual situations that give cause for concern.

Finally, it has been suggested that, whatever the flaws of the exclusionary rule, it must be retained because there is no adequate alternative. This is, we submit, insufficient justification for a rule that carries the heavy costs of the exclusionary rule. Moreover, the continued existence of the rule may well operate to deter the development of more efficacious and less costly alternatives. Accordingly, the time has come for recognition by this Court that, at least in the case of reasonable good-faith violations of the Fourth Amendment, the exclusionary rule is entirely unjustified, if not actually detrimental to the achievement of the goals of the Fourth Amendment.

ARGUMENT

I. AS A JUDICIALLY CREATED RULE OF EVIDENCE, THE EXCLUSIONARY RULE MAY APPROPRIATELY BE MODIFIED IN THE LIGHT OF REASON AND EXPERIENCE

This Court first required the exclusion of evidence obtained by federal agents in violation of the Fourth Amendment in *Weeks* v. *United States*, 232 U.S. 383 (1914), a case involving successive, warrantless searches of an accused's home that resulted in the seizure of letters and other personal documents. Later, in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), the Court extended the application of the Fourth Amendment exclusionary rule to the states in the context of a case involving a forcible, warrantless entry into a suspect's home that was followed by an exploratory search through personal papers and effects. Since

that time, however, the exclusionary rule has been increasingly criticized as "both conceptually sterile and practically ineffective in accomplishing its stated objective" of insuring compliance with the Fourth Amendment by law enforcement officials. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting). Accordingly, members of the Court have repeatedly urged a general reconsideration of the exclusionary rule and the situations in which it is applied. *Id.* at 415-416, 420-421; see also *Robbins* v. *California*, 453 U.S. 420, 437, 443-444 (1981) (Rehnquist, J., dissenting); *California* v. *Minjares*, 443 U.S. 916, 917 (1979) (Rehnquist, J., dissenting from denial of stay); *United States* v. *Ceccolini*, 435 U.S. 268, 283 (1978) (Burger, C.J., concurring); *Brewer* v. *Williams*, 430 U.S. 387, 413-414 n.2 (1977) (Powell, J., concurring); *Stone* v. *Powell*, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring); *id.* at 537-539 (White, J., dissenting); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 271 (1973) (Powell, J., concurring); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 490 (1971) (Harlan, J., concurring).

The instant case offers an appropriate vehicle for such a recvaluation of the exclusionary rule. As we set out in our initial brief in this case (Gov't Br. 2-5), the police officers here obtained a search warrant after making a detailed submission to a state court judge based on both an anonymous tip and corroborating information obtained by investigation of the tip. Thereafter, the officers executed the warrant according to its terms. Assuming, arguendo, that the courts below correctly held that the search warrant was supported by less than probable cause, the officers' conduct here nevertheless stands on a far different footing from the warrantless and palpably unlawful searches at

issue in *Weeks* and *Mapp*. The suppression remedy does not meaningfully protect against the arbitrary invasion of privacy interests—the core value safeguarded by the Fourth Amendment—when, as here, law enforcement officers have acted in the reasonable, good-faith belief that their conduct complies with constitutional standards. Modification of the exclusionary rule to acknowledge this point is consistent with the fundamental purpose of the rule and the cases of this Court explicating it.

A. The Only Viable Justification For The Exclusionary Rule Is Its Presumed Deterrent Effect On Unlawful Police Conduct

Nothing in the Fourth Amendment or any other provision of the Constitution either directly or implicitly provides for the exclusion of illegally seized evidence from criminal trials. Although the plurality opinion in *Mapp*, 367 U.S. at 649, 651, 655-656, suggested that an absolute exclusionary rule is constitutionally required, the Court has never so held. Nevertheless, because the exclusionary rule was first conceived in the context of flagrantly unlawful police conduct and later extended to the states in a case involving even more abusive practices, it is not surprising that, for many years, the Court appeared to assume that the Fourth Amendment required an absolute prohibition against the use of illegally obtained evidence. As the Court has come to focus more clearly on the true purpose of the exclusionary rule and the effect it is likely to have in differing contexts, however, it has recognized that the rule is merely a judge-made rule of evidence—constitutionally based but not specifically constitutionally required—the contours of which must be varied to fit the circumstances. See,

e.g., *United States* v. *Calandra*, 414 U.S. 338, 348 (1974); *Desist* v. *United States*, 394 U.S. 244, 254 n.24 (1969); see also *Stone* v. *Powell*, 428 U.S. at 542 (White, J., dissenting); *Wolf* v. *Colorado*, 338 U.S. 25, 39-40 (1949) (Black, J., concurring) (rule "is a judicially created rule of evidence").[1]

Accordingly, the exclusionary rule "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *Stone* v. *Powell*, 428 U.S. at 486. Because of the inherent trustworthiness of seized tangible evidence and the resulting societal costs from its loss through suppression, application of the exclusionary rule has been carefully "restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348. Thus, any consideration of the extent to which the rule should be modified must begin with a clear understanding of its purpose.

Over time, the justifications advanced in support of the exclusionary rule have varied, but it is now clear that the principal, and certainly the only logical purpose of the rule is to deter Fourth Amendment violations by law enforcement officers by removing the incentive to commit those violations. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. at 486; *United States* v. *Janis*, 428 U.S. 433, 446 (1976). The Court summarized the rule's deterrent purpose succinctly in *Elkins* v. *United States*, 364 U.S. 206, 217 (1960):

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[1] As one commentator put it, "the exclusionary rule does not 'look' like a constitutional doctrine. * * * [It] is merely one arbitrary point on a continuum between deterrence of illegal police activity and conviction of guilty persons." Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1030 (1974).

> The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.

The rise to preeminence of the exclusionary rule's deterrent purpose reflects the abandonment of earlier justifications. Initially, the rule was justified as a remedy for the violation of an accused's personal Fourth Amendment right of privacy. *Weeks*, 232 U.S. at 398. This rationale was difficult to maintain, however, because the exclusionary "remedy" is simply incapable of redressing invasions of privacy (*Calandra*, 414 U.S. at 347):

> The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:
>
> > "[The] ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965).

Moreover, as a remedy for unlawful invasions of privacy, the exclusionary rule is fundamentally irrational because of the haphazardness surrounding its application—only guilty defendants are afforded the benefits of the remedy—and because, as Judge Friendly has observed, "the benefit received [exclusion of evidence proving the defendant's guilt] is wholly disproportionate to the wrong suffered." Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 951 (1965).

Another early rationale for the exclusionary rule was that it served to safeguard the purity of the

courts' processes by forbidding the introduction of tainted evidence. See *Elkins*, 364 U.S. at 222-223. But the " 'imperative of judicial integrity' " has not in fact served as the basis for deciding cases. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 669 (1970). The Court has recognized that the strength of this rationale has been steadily eroded by a series of decisions permitting the collateral use of unlawfully seized evidence. See pages 15-18, *infra*. Thus, preserving the courts' distance from tainted evidence has now been eclipsed by, and indeed subsumed within, the policy of deterrence: to the extent that the judicial integrity rationale was intended to insulate the courts from lawless governmental conduct, that function is fully served by the policy of deterrence. See *Janis*, 428 U.S. at 458-459 n.35; *Stone* v. *Powell*, 428 U.S. at 484-485; *United States* v. *Peltier*, 422 U.S. 531, 536-538 (1975).

But even if the " 'imperative of judicial integrity' " had survived as an independent justification for the exclusionary rule, it would not be impugned by the good-faith exception we propose (see pages 24-25 & n.7, *infra*). As the Court recognized in *Peltier*, 422 U.S. at 537-538, "the 'imperative of judicial integrity' is * * * not offended if law enforcement officials reasonably believed in good faith that their *conduct* was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution." Indeed, we suggest that judicial integrity is put in greater jeopardy by the rendition of erroneous verdicts caused by the suppression of dispositive evidence than it is by the admission of evidence that a reasonably well-trained

police officer could not have been expected to know was being obtained in violation of the Fourth Amendment.

B. The Policy Of Deterrence Dictates A Cost-Benefit Approach To The Application Of The Exclusionary Rule

Recognition that the policy of deterrence is the only logical justification for the exclusionary rule has governed the Court's consideration of a multitude of applications of the rule. For more than a decade, the Court has engaged in a cost-benefit analysis whenever it has confronted suggested expansions of the rule or has examined afresh the propriety of certain applications of the rule. For example, in *Alderman* v. *United States*, 394 U.S. 165, 174-175 (1969), the Court ruled that suppression may be sought only by one whose own Fourth Amendment rights have been violated. The Court concluded that any additional benefits that might flow from extending the suppression remedy to persons not themselves the victims of unlawful searches and seizures were offset by "the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Id.* at 175. See also *United States* v. *Salvucci*, 448 U.S. 83, 94-95 (1980); *Rawlings* v. *Kentucky*, 448 U.S. 98, 104-106 (1980); *United States* v. *Payner*, 447 U.S. 727, 731-734 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 137 (1978).[2]

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[2] These decisions would not be sustainable if the imperative of judicial integrity were a substantial independent basis for the exclusion of illegally obtained evidence, because the im-

Similarly, the Court's recognition of the permissible use of unlawfully seized evidence as an impeachment tool rests on the conclusion that any furthering of the deterrent purpose of the exclusionary rule would be more than offset by the interference with the truth-finding function of criminal trials. See *United States* v. *Havens*, 446 U.S. 620 (1980); *Walder* v. *United States*, 347 U.S. 62 (1954); see also *Oregon* v. *Hass*, 420 U.S. 714 (1975); *Harris* v. *New York*, 401 U.S. 222 (1971). In reaching this conclusion, the Court noted in *Havens* that any increase in deterrence occasioned "by forbidding impeachment of the defendant who testifies [is] deemed insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the factfinding goals of the criminal trial" (446 U.S. at 627).

Likewise, the Court has refused to apply the exclusionary rule when the initial illegality has become attenuated. *E.g.*, *United States* v. *Ceccolini*, 435 U.S. at 280. Again, a cost-benefit analysis controlled the outcome of the case (*ibid.*):

> Application of the exclusionary rule in this situation could not have the slightest deterrent effect * * *. The cost of permanently silencing [a live witness] is too great for an evenhanded system of law enforcement to bear in order to secure such a speculative and very likely negligible deterrent effect.

The Court also has employed a cost-benefit analysis in determining whether to apply the exclusionary rule to various types of proceedings other than the crim-

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pact on judicial integrity of such use does not depend in the least upon whether the particular defendant's rights were infringed in procuring the tainted evidence.

inal trial itself. In *Calandra*, the Court refused to prohibit the use of illegally seized evidence in grand jury proceedings. In reaching this result, the Court stated (414 U.S. at 351-352; footnote omitted):

> Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best. * * * We therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.

A like analysis was employed in *Stone* v. *Powell*, 428 U.S. at 482-495, where the Court held that the substantial costs to society of the suppression remedy would outweigh any marginal deterrent effect that might follow from permitting state prisoners to relitigate search and seizure claims in federal habeas corpus proceedings. And in *Janis*, 428 U.S. at 454, the Court concluded that "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion."

Finally, the Court has employed the same balancing analysis when considering whether Fourth Amendment decisions should be applied retroactively. See, *e.g.*, *Peltier*, 422 U.S. at 538-539; *Williams* v. *United States*, 401 U.S. 646, 654-655 (1971) (plurality opinion); *Desist* v. *United States*, 394 U.S. at 249-250; *Linkletter* v. *Walker*, 381 U.S. 618, 636-639 (1965).[3]

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[3] To the extent that *United States* v. *Johnson*, No. 80-1608 (June 21, 1982), may be read as a departure from these

In these cases, the Court has recognized that retroactive application of new Fourth Amendment standards cannot meaningfully promote the deterrent purpose of the exclusionary rule.

In short, the Court has steadfastly declined to apply the exclusionary rule in circumstances in which the degree of incremental deterrence that suppression might provide is outweighed by the attendant societal costs.[4] This cost-benefit approach is a necessary corollary to the fact that deterrence is the only logical justification for the rule.

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cases, we suggest that it reflects only the Court's concern with according fundamental fairness for persons similarly situated rather than any general retreat from the balancing analysis that the Court has consistently employed in the context of the exclusionary rule.

[4] Using the same reasoning, lower federal courts have placed similar limitations on the application of the exclusionary rule. See, *e.g.*, *Donovan* v. *Federal Clearing Die Casting Co.*, No. 82-1174 (7th Cir. Dec. 9, 1982) (exclusionary rule inapplicable to evidence seized by Occupational Safety and Health Administration pursuant to subsequently-invalidated search warrant); *Tirado* v. *Commissioner*, No. 81-4136 (2d Cir. Sept. 7, 1982) (evidence unlawfully seized by federal narcotics agents admissible in a federal civil tax proceeding; unlikely that narcotics agents would be deterred by prospect that illegally seized evidence might be unavailable in a future tax proceeding); *United States* v. *Lee*, 540 F.2d 1205, 1211 (4th Cir.), cert. denied, 429 U.S. 894 (1976) (exclusionary rule inapplicable to sentencing proceedings); *United States* v. *Schipani*, 435 F.2d 26, 28 (2d Cir. 1970), cert. denied, 401 U.S. 983 (1971) (same); *United States* v. *Winsett*, 518 F.2d 51, 53-55 (9th Cir. 1975) (exclusionary rule inapplicable at parole revocation hearings); *United States* v. *Hill*, 447 F.2d 817, 818-819 (7th Cir. 1971) (same); *United States ex rel. Sperling* v. *Fitzpatrick*, 426 F.2d 1161, 1163-1164 (2d Cir. 1970) (same).

II. THE COSTS OF THE EXCLUSIONARY RULE OUTWEIGH ITS BENEFITS WHEN IT IS APPLIED TO SUPPRESS EVIDENCE OBTAINED IN THE REASONABLE GOOD-FAITH BELIEF THAT THE SEARCH AND SEIZURE IN QUESTION DID NOT VIOLATE THE FOURTH AMENDMENT

After nearly 70 years of experience with the exclusionary rule, it is now appropriate for the Court to employ the same type of cost-benefit analysis utilized in the past in evaluating various applications of the rule (see pages 15-18, *supra*) to a consideration of the wisdom of its application to reasonable good-faith mistakes. Preliminarily, however, we suggest that this weighing is not properly performed on scales that are evenly balanced. By excluding unquestionably reliable and relevant evidence, the exclusionary rule operates in precisely the opposite manner from what we generally demand of other rules of evidence. See, *e.g.*, C. McCormick, *Handbook of the Law of Evidence* § 72 (E. Cleary ed. 1972). Thus, the rule's benefits should not simply be presumed; the rule's retention requires more than an assumption that it *might* have the desired deterrent effect. As the Chief Justice observed in his concurrence in *Stone* v. *Powell*, 428 U.S. at 499-500:

> To vindicate the continued existence of this judge-made rule, it is incumbent upon those who seek its retention * * * to demonstrate that it serves its declared deterrent purpose and to show that the results outweigh the rule's heavy costs to rational enforcement of the criminal law. * * * The burden rightly rests upon those who ask society to ignore trustworthy evidence of guilt, at the expense of setting obviously guilty criminals free to ply their trade.

See also Wilkey, *The Exclusionary Rule: Costs and Viable Alternatives*, 1 Crim. Just. Ethics 16, 20 (1982). In any event, as we shall now demonstrate, such an analysis reveals that the costs of the rule far outweigh its presumed benefits when applied to reasonable police actions undertaken in good faith, particularly in a case such as the instant one. Accordingly, the Court should have no hesitation in fashioning appropriate exceptions to the rule.

A. The Presumed Benefits Of The Exclusionary Rule Are Not Realized By Applying It To Suppress Evidence Obtained In The Good-Faith Belief That The Fourth Amendment Has Not Been Violated

1. The principal benefit claimed for the exclusionary rule is its deterrent effect. Unfortunately for the rule's proponents, however, its deterrent effects have never been proven. The Court itself has acknowledged the lack of reliable empirical evidence to support the deterrent effect of the exclusionary rule. In *Wolf* v. *Colorado*, 338 U.S. 25, 44 n.5 (1949) (Murphy, J., dissenting), Justice Murphy argued that his own "statistical study" of police chiefs supported a broadened application of the rule.[5] Several years later, however, the Court observed that "[t]here is no reliable evidence known to us that inhabitants of those states which exclude the [tainted] evidence suffer less from lawless searches and seizures than those of states that admit it." *Irvine* v. *California*, 347 U.S.

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[5] Justice Murphy's study consisted of 26 replies to a questionnaire he himself sent to the police chiefs of 38 large cities. Only those replies "of any significance" were discussed in the text of his dissenting opinion (338 U.S. at 44 n.5). However commendable Justice Murphy's attempt to gather empirical evidence may have been, he himself recognized the need for more comprehensive research (*ibid.*).

128, 136 (1954). See also *Elkins*, 364 U.S. at 218 ("it cannot positively be demonstrated that enforcement of the criminal law is either more or less effective under either rule").

Since *Mapp*, of course, there have been no meaningful comparative statistics showing the effect the exclusionary rule has had upon police conduct. See *Janis*, 428 U.S. at 452 & n.24. The Court has noted twice in recent years that the available empirical studies are virtually useless. *Stone* v. *Powell*, 428 U.S. at 492 & n.32; *id.* at 498-499 (Burger, C.J., concurring); *Janis*, 428 U.S. at 449-453. This situation is not surprising in view of the manifest difficulty of designing and implementing an adequately controlled comparative study that could produce objectively valid results.

The commentators, like this Court, have concluded that there is no reliable evidence to support the proposition that the exclusionary rule operates effectively to deter police misconduct. The author of the leading empirical study on the question has concluded (Oaks, *supra*, 37 U. Chi. L. Rev. at 755):

> As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. There is no reason to expect the rule to have any direct effect on the overwhelming majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosecution. What is known about the deterrent effect of sanctions suggests that the exclusionary rule operates under conditions that are extremely unfavorable for deterring the police. The harshest criticism of the rule is that it is ineffective.

Thus, the rule cannot be reliably shown to fulfill the only purpose that justifies its implementation. And even if one grants the intuitively plausible but not empirically demonstrated premise that suppression of evidence in a criminal trial can to some extent or in some circumstances deter law enforcement officers from violations of the Fourth Amendment, then it sensibly follows that the degree of deterrence achieved is likely to vary in relation to two factors: the extent to which imposition of the suppression sanction is "painful," and the extent to which the officer can predict at the time he acts that his action is improper and therefore likely to lead to imposition of the sanction. Cases such as *Calandra*, *Stone* v. *Powell*, *Janis* and *Havens* turn upon the Court's assessment of the first of these factors; they reach the result they do because it appeared sufficiently unlikely to the Court that police officers would be encouraged to engage in prohibited conduct by the availability of the particular uses of unlawfully seized evidence there permitted that any speculative deterrent effect was clearly outweighed by the evident costs of suppression.

The present case calls upon the Court to evaluate the second factor, *i.e.*, whether deterrence will be too slight to justify the costs of suppression when the conduct in question is of a sort that a reasonably well-trained officer would not recognize to be unlawful. In advancing the contention that exclusion of evidence is unjustified in such circumstances, we do not (and need not) go so far as to suggest that adoption of a good faith exception would have no effect at all on the presumed deterrability of Fourth

Amendment violations. Perhaps it is tenable to suppose that, if police are responsive to the suppression sanction, then the more sweeping and stringent the use of the sanction, the more cautious they will be in cases in which there is any room for doubt about the legality of a proposed search or seizure, a point the Court made in *United States* v. *Johnson*, slip op. 23-24.

But the mere fact that some deterrence may be postulated plainly cannot control the inquiry here. If it did, the Court's decisions imposing the "standing" requirement, for example, would be totally untenable; it is, after all, hardly disputable that a rule allowing *any* defendant to obtain suppression would be far more likely to deter than one excluding the fruits of reasonable, good faith searches. The question, in short, does not turn merely upon identification of some reasonable possibility of deterrence, but requires an evaluation of the substantiality of the anticipated deterrence. As the Court noted in *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974):

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Similarly, in *Peltier*, 422 U.S. at 542, the Court stated:

> If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

See also *Janis*, 428 U.S. at 458-459 n.35.

2. Experience teaches that Fourth Amendment violations vary greatly in their gravity and, we submit, in their amenability to deterrence. At one end of the spectrum, when officers have made Fourth Amendment intrusions under circumstances "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," or engaged in law enforcement activities that constitute "flagrantly abusive violation[s] of Fourth Amendment rights," "the deterrent value of the exclusionary rule is most likely to be effective." *Brown* v. *Illinois*, 422 U.S. 590, 610-611 (1975) (Powell, J., concurring).[6]

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[6] "[T]he object of deterrence would be sufficiently achieved if the police were denied the fruit of activity intentionally or flagrantly illegal—where there was no reasonable cause to believe there was reasonable cause." H. Friendly, *Benchmarks* 261 (1967) (footnote omitted). See also Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 Tex. L. Rev. 736, 744-745 (1972).

In accord with that sentiment, the ALI's *Model Code of Pre-Arraignment Procedure* § SS 290.2(2) (1975), provides that "[a] motion to suppress evidence * * * shall be granted only if * * * the violation upon which it is based was substantial * * *." In turn, the substantiality of a violation is to be determined from a consideration of "all the circumstances" of a case (*id.* at § SS 290.2(4)), except in those situations where a violation is "gross, wilful and prejudicial to the accused" or "appears to be part of the practice

By contrast, when there is merely a "technical" violation of Fourth Amendment rights occasioned by actions that a reasonably well-trained police officer would not recognize as impermissible, "the deterrence rationale of the exclusionary rule does not obtain," and there is accordingly "no legitimate justification for depriving the prosecution of reliable and probative evidence." *Id.* at 611-612.

In our view, if the exclusionary rule is to function tolerably in our society, it must take account of these differences. Thus, we endorse Justice White's opinion (*Stone* v. *Powell*, 428 U.S. at 538 (White, J., dissenting)) that

> the rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief. These are recurring situations; and recurringly evidence is excluded without any realistic expectation that its exclusion will contribute in the slightest to the purposes of the rule, even though the trial will be seriously affected or the indictment dismissed.[7]

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of the law enforcement agency" (*id.* at § SS 290.2(3)). As one commentator has stated, "the purpose of the test is to invite courts to reconsider the need for exclusion where the fourth amendment violation is relatively minor and is neither willful nor reflective of agency policy or general indifference to individuals' rights." Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Geo. L. J. 1361, 1423 (1981) (footnote omitted).

[7] We need not here essay a precise delineation of the contours of an appropriate "good-faith" exception. At a minimum, it would cover the situation in which it can fairly be

This type of focused exception responsive to the policies of the exclusionary rule has been expressly adopted by the Fifth Circuit. *United States* v. *Williams*, 622 F.2d 830 (1980) (en banc), cert. denied, 449 U.S. 1127 (1981). There, a federal agent who had previously arrested Williams in Ohio for a narcotics violation encountered her in another state. The agent knew that a condition of Williams' release on bond pending appeal was that she remain in Ohio. Accordingly, the agent arrested Williams for violating this condition and, in ensuing searches incident to the arrest, seized heroin from Williams' possession.

Sitting en banc, the Fifth Circuit held unanimously that the district court should not have suppressed the heroin. One majority of the court held that the federal agent had legal authority to arrest Williams because, by violating a condition of her bail release, she had committed the crime of contempt of court in the agent's presence (622 F.2d at 836-839). A different, overlapping majority of the court held that, irrespective of the validity of Williams' arrest, the

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concluded that no reasonable police officer could have appreciated that his conduct was barred by the Fourth Amendment. At its broadest, it would exclude from its embrace only those "flagrantly abusive" violations (*Brown* v. *Illinois*, 422 U.S. at 610 (Powell, J., concurring)) that any minimally trained police officer should have known to be prohibited. This case does not call upon the Court to refine the concept very far because, as we discuss more fully hereafter, even the most modest formulation of the exception would amply suffice to allow introduction of the evidence discovered in execution of the search warrant here. We do stress, however, that any formulation of the principle should rest upon an objective standard for evaluating "good-faith," and that arguments that adoption of such an exception would place a premium upon police ignorance of the law are wholly erroneous and misplaced (see pages 57-59 & n.39, *infra*).

heroin should not have been suppressed because the agent had acted in good faith in arresting and searching Williams, and could not reasonably be expected to have known that there was any serious doubt concerning his authority to make the arrest. Because the purpose of the exclusionary rule is to deter "willful or flagrant actions by police, not reasonable, good-faith ones" (622 F.2d at 840), the court concluded that it made no sense to suppress evidence in these circumstances, "unless we somehow wish to deter [police officers] from acting at all" (*id.* at 842). The court noted that its decision was fully consistent with this Court's cost-benefit approach to the exclusionary rule (*id.* at 842-843; citations omitted; emphasis added):

> Any slight deterrent effect of excluding fruits of good-faith arrests is *even less* than the small deterrence from suppressing the fruits of illegal police actions that are attenuated in effect, that are challenged in habeas corpus petitions on fourth amendment grounds, that are used in grand jury deliberations, or that are used for impeachment. Yet the Supreme Court has found that the deterrent effect of exclusion in the examples listed and others does not justify the societal harm incurred by suppressing relevant and incriminating evidence. * * * The good-faith exception that we explicitly recognize today is of a kind with these.[8]

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[8] The Fifth Circuit is not the only court to have adopted a good faith exception to the exclusionary rule. See *United States* v. *Ajlouny*, 629 F.2d 830, 840-841 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981) (even if warrantless national security wiretap was unlawful, suppression not required where agents acted in good faith and could not be charged with knowledge that their conduct was improper); *United States* v. *Nolan*, 530 F. Supp. 386, 396-399 (W.D. Pa. 1981) (suppression not required for what was, at most, a

3. The facts in *United States* v. *Williams*, requiring the officer to make an on-the-spot legal decision concerning the scope of his arrest powers, an issue

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technical, good faith violation of the knock-and-announce rule); *United States* v. *Wilson*, 528 F. Supp. 1129, 1132 (S.D. Fla. 1982) (even if arrest effectuated outside of officers' territorial jurisdiction was not a lawful citizen's arrest, good faith exception bars suppression of marijuana); *Gifford* v. *State*, 630 S.W.2d 387, 391 (Tex. Ct. App. 1982) (suppression not required where officers relied in good faith on a search warrant later found to be technically defective); *Richmond* v. *Commonwealth*, 50 U.S.L.W. 2162 (Ky. Ct. App. 1981) (same); *People* v. *Adams*, 53 N.Y.2d 1, 9-10, 422 N.E.2d 537, 541 (1981) (suppression not required where agent relied in reasonable good faith on purported authority of accused's girlfriend to consent to a search of his apartment); cf. cases cited at page 18 note 4, *supra*. The Supreme Judicial Court of Massachusetts recently declined to adopt such an exception, but only because it felt constrained to wait for this Court to do so first. *Commonwealth* v. *Sheppard*, 32 Crim. L. Rep. (BNA) 2157 (Dec. 1, 1982). The dissent, noting that the only defect in the search warrant was the failure to attach or incorporate by reference the officers' supporting affidavit, observed that "for want of a staple, highly probative evidence is lost. Such dedication to rigid formality is commanded neither by the Constitution nor by logic." *Id.* at 2158.

A number of legal commentators have joined the Fifth Circuit and other courts following its lead in noting the absence of any meaningful deterrent effect when police officers have acted in the reasonable, good faith belief that their conduct was lawful. See, *e.g.*, Carrington, *Good Faith Mistakes and the Exclusionary Rule*, 1 Crim. Just. Ethics 35, 37-38 (1982); Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Geo. L. J. 1361, 1380 (1981); Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. Crim. L. & Criminology 635, 650 (1978); Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1044 (1974).

that had not been judicially resolved adversely to his action, vividly illustrate the need for modification of the exclusionary rule. Policemen are not trained legal technicians; nevertheless, they are expected to make quick decisions, often involving complicated legal and factual analyses, "in the course of the difficult and often dangerous business of law enforcement." Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 Tex. L. Rev. 736, 741 (1972). Thus, countless officers in the field must daily decide under rapidly-changing circumstances whether there exists the requisite probable cause to support an arrest or a search. In such cases, "[i]nadvertent errors of judgment" and "honest mistakes" will "inevitably occur given the pressures inherent in police work having to do with serious crimes." *Bivens*, 403 U.S. at 418 (Burger, C.J., dissenting).

The uncertainties inherent in police work are exacerbated by a lack of coherent Fourth Amendment standards that are readily recognizable and predictably applied by officers in the field. Too often, courts leave police officers to resolve these difficult questions for themselves, see *New York* v. *Belton*, 453 U.S. 454, 470 (1981) (Brennan, J., dissenting), and then feel free to second-guess their entirely reasonable judgments. The result is that the courts have engendered a "state of uncertainty" that is "intolerable" to the officer on the beat. *Coolidge* v. *New Hampshire*, 403 U.S. at 490-491 (Harlan, J., concurring).[9] Without

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[9] As Justice Frankfurter once remarked, "the course of true law pertaining to searches and seizures * * * has not—to put it mildly—run smooth." *Chapman* v. *United States*, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring). See also *Cady* v. *Dombrowski*, 413 U.S. 433, 440 (1973) ("this

the ability accurately to predict how courts will resolve Fourth Amendment questions, law enforcement officers will neither know the scope of their authority nor be sufficiently deterred from improper action to justify application of the exclusionary rule. See *New York* v. *Belton*, 453 U.S. at 459-460; see also LaFave, *Improving Police Performance Through the Exclusionary Rule*, 30 Mo. L. Rev. 391, 395 (1965).[10]

There is no basis for faulting an officer who has made a reasonable but incorrect assessment regarding the existence of reasonable suspicion or probable cause or the necessity of obtaining a warrant. Fourth Amendment adjudications inevitably leave "much room for disagreement among judges, each of whom is convinced that both he and his colleagues are reasonable men. Surely when this Court divides five to four on issues of probable cause, it is not tenable to conclude that the officer was at fault or acted

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branch of the law is something less than a seamless web"). Legal commentators have agreed with these observations. See, *e.g.*, Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349 (1974) ("For clarity and consistency, the law of the fourth amendment is not the Supreme Court's most successful product"); Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1033 (1974) (Fourth Amendment law "is so complicated and abstruse that the police often honestly and reasonably cannot determine in advance" how it will be applied); Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 Hastings L. J. 1065, 1092 (1982) (Fourth Amendment law marked by "sophisticated, complicated, and confusing decisions").

[10] As Professor LaFave has noted, "[t]he threat of evidence exclusion can have little impact unless decision-making officers have some basis for determining what conduct will bring about exclusion" (*id.* at 396).

unreasonably in making the arrest." *Stone* v. *Powell*, 428 U.S. at 540 (White, J., dissenting).[11] Justice White went on to note (*id.* at 539-540):

> [E]xperience tells us that there will be those occasions where the trial or appellate court will disagree on the issue of probable cause, no matter how reasonable the grounds for arrest appeared to the officer and though reasonable men could easily differ on the question. It also happens that after the events at issue have occurred, the law may change, dramatically or ever so slightly, but in any event sufficiently to require the trial judge to hold that there was not probable cause to make the arrest and to seize the evidence offered by the prosecution. * * *
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> In these situations, and perhaps many others, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that in each of them the officer is acting as a reasonable officer would and should act in similar circumstances. Exclud-

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[11] And, of course, the instances are legion in which lower courts have *erroneously* condemned officers' actions as violative of the Fourth Amendment. See, *e.g.*, *New York* v. *Belton*, 453 U.S. 454 (1981); *United States* v. *Cortez*, 449 U.S. 411 (1981); *Colorado* v. *Bannister*, 449 U.S. 1 (1980); *United States* v. *Ramsey*, 431 U.S. 606 (1977); *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976); *United States* v. *Watson*, 423 U.S. 411 (1976); *Texas* v. *White*, 423 U.S. 67 (1975). Even as this is written, the Court has at least 11 cases (see pages 54-55 note 37, *infra*), including this one, in which it has undertaken to review holdings of lower courts that may well have confused or misunderstood the dictates of the Fourth Amendment in holding a search or seizure unlawful.

> ing the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.[12]

Quite clearly, it is in these "grey, twilight area[s], where the law is difficult for courts to apply, let alone for the policeman on the beat to understand," that the exclusionary rule is least efficacious in deterring

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[12] Lower court judges have made the same point. For example, in *Government of the Virgin Islands* v. *Rasool*, 657 F.2d 582, 595 (3d Cir. 1981) (Adams, J., concurring), Judge Adams observed:

> [I]t is not realistic to expect the exclusionary rule to deter misconduct on the part of police officers. Often there is no misconduct to deter or punish—the officer has simply acted reasonably in a pressured situation and is later told he guessed wrong about how Supreme Court precedents might be interpreted to apply in fine-line situations.

In a similar vein, Judge Wilkey has noted (*United States* v. *Ross*, 655 F.2d 1159, 1204 (D.C. Cir. 1981) (en banc) (footnote omitted) (Wilkey, J., dissenting), rev'd, No. 80-2209 (June 1, 1982)):

> [T]oo many prosecutions * * * have gone awry, not as a result of intentional police misconduct, and certainly not because of any doubt about the guilt of the criminal, but simply because a court, with the benefit of time to reflect and of hindsight, concludes that an officer acting under pressure in the field, maybe under fear for his own life, failed properly to apply the often confused and confusing standards of conduct set out by courts interpreting the Constitution.

Judge Wilkey also observed that in cases in which the law is not settled, courts "would have to impute to [police officers] nearly supernatural powers to see the future before we could charge [them] with knowledge that [their] conduct was unconstitutional" (*id.* at 1181).

police misconduct. *Schneckloth* v. *Bustamonte*, 412 U.S. at 269 (Powell, J., concurring).[13]

4. The good faith exception to the exclusionary rule that we advocate here is consistent with this Court's recognition of the ameliorating effects of police good faith in other Fourth Amendment contexts. For example, in *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979), a police officer made an arrest in good-faith reliance on a municipal ordinance later declared to be unconstitutional. In an ensuing search incident to the arrest, the officer seized drugs from the defendant's person. In upholding the admissibility of the seized drugs, the Court stated (*id.* at 37-38):

> A prudent officer, in the course of determining whether [the defendant] had committed an of-

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[13] If concrete examples of the problem are necessary, one need only look to the Court's decisions in *New York* v. *Belton*, 453 U.S. 454 (1981), and *Robbins* v. *California*, 453 U.S. 420 (1981). The facts of the cases were remarkably similar. In both cases, police officers lawfully stopped a car, smelled burnt marijuana, discovered marijuana in the passenger compartment of the car, and lawfully arrested the occupants. Thereafter, in *Robbins*, the officer found two packages wrapped in green opaque paper in the recessed rear compartment of the car, opened them without a warrant, and found 30 pounds of marijuana. In *Belton*, the officer found a jacket in the passenger compartment, unzipped the pocket without a warrant, and found a quantity of cocaine.

When the Court decided these cases, three Justices opined that both searches were legal; three Justices opined that they were both illegal; and three Justices controlled the ultimate decision that the search in *Robbins* was illegal and that in *Belton* legal. It may come as small consolation to the officer who made the search in *Robbins* that only a year later the decision was overruled in *United States* v. *Ross*, No. 80-2209 (June 1, 1982).

> fense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional. * * * [14]

Similarly, in *United States* v. *Caceres*, 440 U.S. 741 (1979), Internal Revenue agents conducted a series of "consensual electronic surveillance" encounters with a targeted taxpayer. Although internal agency guidelines required prior authorization for such surveillance, the agents failed to obtain written authorization. Refusing to require suppression of the fruits of the unauthorized surveillance, the Court noted that "[t]he agency action, while later found to be in violation of the regulations, nonetheless reflected a reasonable, good-faith attempt to comply in a situation" in which monitoring was appropriate and would have been authorized had the request for authorization been received more promptly (*id.* at 757). So too, in *Hill* v. *California*, 401 U.S. 797 (1971), officers had probable cause to arrest Hill; however, the officers mistakenly arrested one Miller, who was present in Hill's apartment, and conducted a search incident to the arrest that disclosed evidence incriminating Hill. In upholding the validity of the seizure, the Court stated: "The upshot was that the officers in good faith believed Miller was Hill and arrested

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[14] The Court recognized (443 U.S. at 38 n.3):

> The purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the [defendant], was the product of a lawful arrest and a lawful search. To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

him. They were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But * * * the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time" (401 U.S. at 803-804). Finally, in *Franks* v. *Delaware*, 438 U.S. 154 (1978), the Court limited the circumstances in which a defendant may challenge the truthfulness of allegations in a search warrant affidavit to those effectively involving official bad faith. Thus, as the Court made clear, "[t]here must be allegations of deliberate falsehood or of reckless disregard for the truth * * *. Allegations of negligence or innocent mistake are insufficient" (*id.* at 171).

5. Finally, the good faith exception to the exclusionary rule that we propose comports fully with the context in which the rule was first promulgated and then applied to the states. It has been noted that pre-*Mapp* cases frequently involved "arrogant or brazen police behavior." Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Geo. L.J. 1361, 1414-1415 (1981) (footnote omitted). As we observed at the outset (see page 9, *supra*), both *Weeks* and *Mapp* involved warrantless, exploratory searches through private papers and effects. So too, many of the early cases in which the exclusionary rule was first applied involved equally egregious misconduct.[15] In keeping

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[15] See, *e.g.*, *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 390-391 (1920) (prosecutor conceded "outrageous" conduct based on a warrantless documents search conducted "without a shadow of authority"); *Gouled* v. *United States*, 255 U.S. 298 (1921) (surreptitious document search); *Agnello* v. *United States*, 269 U.S. 20 (1925) (warrantless search of home as incident to an arrest that occurred blocks

with this historical perspective, nothing in the modification we propose will prevent courts from excluding evidence obtained through intentional or clearly abusive police misconduct.

But it makes no sense to apply a rule of suppression that was conceived in the context of palpably egregious police misconduct to the multitude of present-day cases in which law enforcement officers make reasonable, good-faith efforts to comply with the Constitution. Police resort to the preferred warrant procedure has markedly increased in the years since *Mapp* was decided (see 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 1.2, at 26 (1978)), law enforcement officers have to a far greater extent become well-trained professionals, and the cases litigated most often probe the "grey, twilight areas" of Fourth Amendment law, rather than directly touching the core values of that constitutional protection. Against this background, neither the fundamental values of the Fourth Amendment nor the deterrent purpose of the exclusionary rule can be meaningfully advanced by the suppression of evidence when law enforcement officers attempt in good faith to navigate the intricate channels of Fourth Amendment law. Simply put, when law enforcement officers have acted in a manner far removed from the egregious type of conduct that the exclusionary rule was first designed to combat, their honest mistakes should not be met with the severe sanction of suppression.

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away); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344 (1931) (warrantless, exploratory search of documents); *United States* v. *Jeffers*, 342 U.S. 48, 52 (1951) (warrantless search of hotel room conducted "surreptitiously and by means denounced as criminal").

B. The Reasons For Applying the Exclusionary Rule Are Most Remote When Law Enforcement Officers Have Relied In Good Faith On A Judicially-Issued Search Warrant

1. Whether or not suppression may provide some deterrent against warrantless searches that police officers reasonably fail to recognize as improper, it is nothing short of irrational to expect any deterrent effects from the suppression of evidence obtained pursuant to judicially-issued search warrants.[16] Rather, "[i]mposing an admittedly indirect 'sanction' on the police officer in that instance is nothing less than sophisticated nonsense" (*Stone* v. *Powell*, 428 U.S. at 498 (Burger, C.J., concurring)), because law enforcement officers will never be deterred from executing a search warrant that a judge has told them is valid. "Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." *Ibid.*[17] See *United States* v. *Hill*, 500 F.2d 315, 322 (5th Cir. 1974); *Gifford* v. *State*, 630 S.W.2d at 391; *Richmond* v. *Commonwealth*, 50

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[16] Professor Kaplan has noted that "application of the exclusionary rule is most clearly a windfall to the criminal" where a warrant is obtained that is later found to be defective, since it is "[i]n these situations [that] it is probable that the criminal would have been caught" even if all Fourth Amendment requirements had been met. See Kaplan, *supra*, 26 Stan. L. Rev. 1027, 1038 (1974).

[17] As Professor Levy has noted (L. Levy, *Against the Law: The Nixon Court and Criminal Justice* 81 (1974)):

> [T]o penalize the police by holding that a magistrate had not scrutinized the facts with enough independence is comparable to penalizing a prosecutor by holding that the police obtained the evidence illegally. The sanction of the law strikes the wrong party when the police have obtained a warrant.

U.S.L.W. at 2162; cf. *United States* v. *Ross*, No. 80-2209 (June 1, 1982), slip op. 25 n.32 ("[A] warrant issued by a magistrate normally suffices to establish" that a law enforcement officer has "acted in good faith in conducting the search"); *United States* v. *Alvarez-Porras*, 643 F.2d 54, 65-66 (2d Cir.), cert. denied, 454 U.S. 839 (1981) (deterrent purpose of exclusionary rule is not served in circumstances that include the agents' good-faith attempt to comply with the warrant requirement).[18] Quite clearly, neither the fundamental values of the Fourth Amendment nor the deterrent purpose of the exclusionary rule can be meaningfully advanced by the suppression of evidence in situations where a search warrant is invalidated because of a technical defect, *e.g.*, *United States* v. *Shorter*, 600 F.2d 585 (6th Cir. 1979); *Commonwealth* v. *Sheppard*, 32 Crim. L. Rep. (BNA) 2157 (Dec. 1, 1982),[19] because the issuing official,

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[18] See also Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Geo. L.J. 1361, 1418-1419 (1981) (footnote omitted):

> A search conducted in accordance with the terms of the warrant necessarily involves good faith * * *. When the police have dutifully applied to a judge or a magistrate for a search warrant, and have executed the warrant in strict conformity with its terms, exclusion of the evidence thus obtained can have no possible deterrent effect on future police conduct.

Accord, P. Johnson, *New Approaches to Enforcing the Fourth Amendment* 8-9 (Working Paper Sept. 1978), quoted in 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 1.2, at 3 (Supp. 1982).

[19] In *Shorter*, suppression was ordered because, despite a clear demonstration of probable cause, the magistrate failed to administer an oath to the affiant "immediately" at the beginning of his telephonic application for a search warrant, as required by Rule 41(c)(2)(D), Fed. R. Crim. P. In *Shep-*

although authorized by statute to issue warrants, is found to lack the requisite degree of neutrality, see *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971),[20] or because, as in the present case, a reasonable, good-faith presentation of information to a neutral judicial officer is later determined to fall short of probable cause, *e.g.*, *United States* v. *Karathanos*, 531 F.2d 26, 35 (2d Cir.), cert. denied, 428 U.S. 910 (1976).

Importantly, this Court has never articulated *any* rationale for applying the exclusionary rule to suppress evidence obtained pursuant to a search warrant; it has simply done so without discussing the policies to be served. The situation is thus remarkably similar to that presented in *Stone* v. *Powell*, in which the Court acknowledged that its prior decisions had not fully considered the extent to which the exclusionary rule should apply in federal habeas corpus proceedings (428 U.S. at 480-481 & n.15). Upon examination, of course, the Court concluded that the cost of permitting state prisoners to relitigate search and seizure issues outweighed any incremental deterrent effect that might flow from applica-

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pard, the state court reluctantly ordered suppression because the police officers' supporting affidavit was neither attached to nor incorporated by reference into the search warrant.

[20] Concurring in *Coolidge*, Justice Harlan noted that nothing in the unlawful conduct in that case touched on "core" Fourth Amendment values (403 U.S. at 491). See also *Bivens*, 403 U.S. at 418-419 (Burger, C.J., dissenting) (even assuming the conduct in *Coolidge* was improper, it "was surely insufficient in nature and extent to justify the drastic result dictated by the suppression doctrine"); Kaplan, *supra*, 26 Stan. L. Rev. at 1036 (footnote omitted) ("the police practices revealed in *Coolidge* v. *New Hampshire* are hardly incompatible with a moral society; yet letting the defendant in that case go free perhaps is").

tion of the exclusionary rule. Here, too, the Court is presented with its first real occasion to examine the policies of the exclusionary rule as they relate to evidence obtained pursuant to a warrant. As in *Stone* v. *Powell*, should that examination reveal the absence of sufficient justification for continuing to apply the exclusionary rule in such circumstances, the Court should not hesitate to modify the rule.

2. Application of the exclusionary rule to the fruits of judicially-warranted searches is not only irrational, but may well reduce incentives for police resort to the warrant procedure, which this Court has repeatedly held is the constitutionally preferred method for safeguarding individual privacy rights. *United States* v. *United States District Court*, 407 U.S. 297, 317 (1972); *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968); *United States* v. *Ventresca*, 380 U.S. 102, 106-107 (1965); *Johnson* v. *United States*, 333 U.S. 10, 14 n.3 (1948); 2 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.2, at 29 (1978).[21] Thus, a good-faith exception to the exclusionary rule when a warrant has been obtained would provide a substantial incentive for law enforcement officers to utilize the preferred warrant procedure. See *Brown* v. *Illinois*, 422 U.S. at 611 & n.3 (Powell, J., concurring). Unlike instances in which the police have acted without judicial authorization and in which an exclusionary rule might, in limited circumstances, provide a deterrent to future miscon-

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[21] In explaining the essence of the Fourth Amendment, the Court has stated: "[W]here practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." *United States* v. *United States District Court*, 407 U.S. at 316.

duct, resort to the warrant procedure itself provides a substantial alternative barrier to unreasonable or otherwise defective searches and seizures. See *Jones* v. *United States*, 362 U.S. 257, 270-271 (1960); *Johnson* v. *United States*, 333 U.S. at 14; *United States* v. *Lefkowitz*, 285 U.S. 452, 464 (1932). For this reason, the Court has recognized that errors of judgment by a magistrate should not necessarily be treated as severely as Fourth Amendment violations by law enforcement officers acting without judicial supervision and approval. See *United States* v. *Watson*, 423 U.S. 411, 423 (1976); *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969); *United States* v. *Ventresca*, 380 U.S. at 109; *Aguilar* v. *Texas*, 378 U.S. 108, 111 (1964); *Jones* v. *United States*, 362 U.S. at 270-271. As the Court explained in *Aguilar*, 378 U.S. at 111, quoting *Jones*, 362 U.S. at 271:

> [W]hen a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judically competent or persuasive character than would have justified an officer in acting on his own without a warrant," * * * and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present. . . ."

A good-faith exception to the exclusionary rule in the case of evidence seized pursuant to a warrant would thus fully comport with the special status the Court has attached to warrants in the past.

3. Moreover, we submit that the exclusionary rule is an inherently inappropriate device for deterring Fourth Amendment violations that are the result of

judicial miscalculation, rather than police misconduct. As the Court observed in *Janis*, 428 U.S. at 448, application of the exclusionary rule must be tied to the identity of those who are to be deterred and the nature of the conduct that is to be controlled. And, in the Fourth Amendment context, the purpose of the rule is to deter police miscalculation, not judicial errors.[22] Accordingly, as was recognized by the Supreme Judicial Court of Massachusetts (*Commonwealth* v. *Sheppard*, 32 Crim. L. Rep. (BNA) at 2158):

> The exclusionary rule may not be well tailored to deterring judicial misconduct. If applied to judicial misconduct, the rule would be just as costly as it is when it is applied to police misconduct, but it may be ill-fitted to the job-created motivations of judges. As we have said, ideally a judge is impartial as to whether a particular piece of evidence is admitted or a particular defendant convicted. Hence, in the abstract, sup-

[22] There is no constitutional requirement that an official issuing a warrant be either a judge or a lawyer, so long as the official is neutral and capable of assessing probable cause. See *Shadwick* v. *City of Tampa*, 407 U.S. 345, 348-350 (1972). In the federal system, however, magistrates will usually be trained and experienced lawyers. Thus, the Federal Magistrates Act, 28 U.S.C. (& Supp. V) 631 *et seq.*, requires, with limited exceptions, that all magistrates have practiced law for five years (28 U.S.C. (Supp. V) 631(b)(1)), that they be selected pursuant to merit selection procedures (28 U.S.C. (Supp. V) 631(b)(2)), and that they attend special training programs (28 U.S.C. 637). Although neither constitutionally required nor necessary to give rise to the preference that reviewing courts extend to a magistrate's determinations, we think these salutory features enhance the presumption of propriety that applies to a federal magistrate's probable cause determinations. These same enhancing considerations also apply to the warrant in the instant case, which was issued by a state court judge.

pression of a particular piece of evidence may not be as effective a disincentive to a neutral judge as it would be to the police. It may be that a ruling by an appellate court that a search warrant was unconstitutional would be sufficient to deter similar conduct in the future by magistrates. We question, therefore, whether suppression of evidence is necessary as a deterrent in cases where the police conduct was entirely proper, the defendant was not prejudiced by the magistrate's error, and an appellate court clearly identifies the magistrate's error of law as a guide to future conduct.[23]

4. We do not suggest that the exclusionary rule is never appropriate when a search has been conducted pursuant to a warrant, or that the mere issuance of a warrant wholly forecloses further inquiry into the existence of probable cause. Even when a warrant has been obtained, suppression of evidence may be justified if the factors relied on by the magistrate "were so lacking in indicia of probable cause

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[23] Moreover, because the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved," *Calandra*, 414 U.S. at 348 (footnote omitted), strict adherence to the rule is both unnecessary and unwise because suitable and efficacious substitute remedies, less costly to society, are available, at least in the federal system. A United States Magistrate, unlike a law enforcement officer, is subject to the control and direction of the district court and may be removed by the court for "incompetency, misconduct, neglect of duty, or physical or mental disability." 28 U.S.C. (Supp. V) 631(i). If it appears that a particular magistrate is serving merely as a "rubber stamp" or has demonstrated an inability to exercise mature judgment, a remedy is available that is far more direct and effective, and less costly to the criminal justice system, than the suppression of evidence in a later proceeding.

as to render official belief in its existence entirely unreasonable," *Brown* v. *Illinois*, 422 U.S. at 610-611 (Powell, J., concurring), or if the warrant had been procured in bad faith or on the basis of material misrepresentations, see *Franks* v. *Delaware*, 438 U.S. 154 (1978). Application of the rule in such circumstances would be consistent with its historic underpinnings. But as Professor Amsterdam has written, "the rule is a needed, but grudingly [sic] taken, medicament; no more should be swallowed than is needed to combat the disease." Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 389 (1964).

Manifestly, the rare circumstances that might justify exclusion of the fruits of a judicially-warranted search are not present here, in view of the meticulous care taken by the police to ensure that their conduct at all times comported with constitutional requirements. First, rather then taking precipitous action based on the anonymous tip, the police independently investigated the allegations in the tip and sought to corroborate them through surveillance of Lance Gates. When their surveillance confirmed the accuracy of much of the information provided in the tip, the police did not act on their own initiative, but instead sought a warrant from a neutral judicial officer.[24] Moreover, they provided the judicial officer with every bit of information they possessed that would assist him in making a reasoned, independent

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[24] Because one object of the officers' suspicion in this case was an automobile, the police were not constitutionally obliged to obtain a warrant for that part of their proposed search. See, *e.g.*, *Chambers* v. *Maroney*, 399 U.S. 42 (1970). Their decision to seek prior judicial approval for the search of the automobile is indicative of their good faith.

decision, including copies of the informant's letter and the report from the Illinois Secretary of State (see Pet. App. 4b, 10b). And they executed the warrant properly and in the good-faith belief that it was valid. In turn, the judge issuing the warrant clearly had at least "reasonable cause to believe there was reasonable cause." H. Friendly, *Benchmarks* 261 (1967) (footnote omitted). In these circumstances, it would advance no Fourth Amendment policy to suppress the seized evidence.

C. In Light Of The Exclusionary Rule's Inability To Fulfill Its Deterrent Purpose When Applied To Honest Mistakes, Its Costs Are Higher Than Our System Of Criminal Justice Can Afford

Many of the costs of the exclusionary rule have been alluded to in previous sections of this brief. Nevertheless, in completing the cost-benefit analysis that we commend to the Court, it is appropriate to recapitulate briefly the most obvious costs and to elaborate more fully on some of the less evident ones.

First, the exclusionary rule excludes from consideration at trial the very evidence that is most relevant and trustworthy.[25] The rule thus subverts the courts' paramount truthfinding function. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. at 489; *id.* at 499-500 (Burger, C.J., concurring); *Janis*, 428 U.S. at 448-449.

Second, the exclusionary rule benefits only those who are unquestionably guilty. In the now-famous words of Justice Cardozo, particularly apt to consid-

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[25] As Judge Wilkey has observed, "it is all important that *there is never any question of reliability* in exclusionary rule cases involving material evidence * * *. An illegal search in no way reduces the reliability of the evidence." Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 Judicature 215, 222 (1978) (emphasis in original).

eration of a good-faith exception, the rule allows "[t]he criminal * * * to go free because the constable has blundered." *People* v. *Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587, cert. denied, 270 U.S. 657 (1926). The rule does nothing, however, to repair injury to innocent victims of unreasonable searches.

Proponents of the exclusionary rule have argued that only a very small number of guilty defendants actually go free because of it, and that this is a small price to pay to safeguard the Fourth Amendment rights of all citizens.[26] In addition to the fact that the freeing of even one guilty defendant by virtue of an irrational rule may exact a greater cost than society should be expected to bear (see pages 50-52, *infra*), this argument disregards evidence that tends to demonstrate very real costs, in numerical terms, of the rule's operation.

For the proposition that the exclusionary rule actually affects relatively few defendants, the rule's proponents generally point to a 1979 study by the General Accounting Office, which concluded that of all cases declined for prosecution by United States Attorneys, Fourth Amendment search and seizure problems were the *primary* reason for declination in only 0.4% of the total. *Comptroller General of the United States*, Rep. No. GGD-79-45, *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* 14 (1979) (hereinafter cited as *"GAO Report"*). Emphasis on the relatively low declination rate, however, ignores other significant findings of the GAO

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[26] See, *e.g.*, *The Exclusionary Rule Bills: Hearings on S. 101, S. 751 and S. 1995 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 35-37 (1981) (testimony of Stephen H. Sachs); 1 W. LaFave, *Search and Seizure* § 1.2 n.9, at 1 (Supp. 1982).

study.[27] For example, the GAO study noted the dramatic effect that a successful suppression motion is likely to have on the outcome of individual cases. In more than 84% of the cases in which a suppression motion had been denied, a conviction was obtained. The conviction rate dropped dramatically, however, to about 50%, whenever a suppression motion had been granted in whole or in part. *Id.* at 13. Although the GAO study did not attempt to explain the reasons for these differences, it is obvious, as the GAO Report acknowledged (*ibid.*), that a definite relationship exists between the suppression of evidence and the prosecution's ability to obtain a conviction.

Equally important, the GAO study has been criticized for its failure to break down its results by the nature of the criminal charges. Certain types of crimes, particularly those involving drugs or weapons, are much more likely than others to present search and seizure issues. Oaks, *supra*, 37 U. Chi. L. Rev. at 681-683. The GAO study, however, "simply analyzed aggregate data for a wide variety of federal felony arrests" in arriving at its conclusion that the exclusionary rule has little apparent impact. National Institute of Justice, *The Effects of the Exclusionary*

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[27] The declination rate may well be an inappropriate measurement from which to draw meaningful conclusions concerning the effects of the exclusionary rule. Declinations may be low because relatively few federal cases involve manifestly illegal searches. Assistant United States Attorneys may thus choose to go forward in a significant number of cases that have search and seizure problems that may be assessed as troublesome but worth litigating. This hypothesis is borne out by the frequency with which suppression motions are denied (*GAO Report* 10).

Rule: A Study in California 1 (Dec. 1982) (hereinafter cited as "*NIJ Report*"). Significantly, "[m]ost of the federal caseload at the time the [GAO] study was conducted was composed of such white collar crimes as embezzlement, fraud and forgery. Search and seizure issues are seldom raised in these cases." *NIJ Report* 7.[28]

In an attempt to provide more comprehensive data, the NIJ Report undertook a statewide study of all felony arrests in California during the years 1976-1979, and then broke down its results by type of crime. The study's findings were significant. In contrast to the GAO study, the NIJ study "found a major impact of the exclusionary rule on state prosecutions" and further found that the impact was most pronounced in narcotics cases. *NIJ Report* 2. Looking at statewide felony arrests generally, NIJ found that 4.8% of the more than 4,000 felony cases declined for prosecution were rejected because of search and seizure problems.[29] *NIJ Report* 1. This is 12

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[28] The GAO Report also confined its analysis to cases handled during the two-month period from July 1 through August 31, 1978. GAO recognized that this time period might produce seasonal distortions because of summer vacations, but it did not believe that the variations would be material. *GAO Report* 17. There is, of course, no way of telling whether the time period selected for the study did in fact affect its outcome.

[29] NIJ also found that declinations due to search and seizure issues were much higher in large urban areas than on a statewide basis. In San Diego County, 8.5% of the declinations in 1980 were due to search and seizure problems. In two Los Angeles area District Attorneys' offices, 11.7% and 14.6% of the 1981 declinations were for search and seizure problems. *NIJ Report* 1.

times the 0.4% declination rate reported by the GAO study. Moreover, the NIJ study found that the effect of the exclusionary rule in drug cases is truly substantial. Prosecutors rejected approximately 30% of all felony drug arrests because of search and seizure problems. *NIJ Report* 2.[30]

The NIJ study also provides important new data about the exclusionary rule's effect on society by examining the prior and subsequent arrest histories of defendants whose cases were dismissed. The study concluded (*NIJ Report* 2; emphasis added):

> For most defendants, the arrest that ended in release because of the exclusionary rule was only a single incident in a longer criminal career. About half of those freed were rearrested during the [two-year] follow-up period; they averaged approximately three rearrests each.
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> To a substantial degree, individuals released because of search and seizure problems were those with serious criminal records who appeared to continue to be involved in crime after their release. *The felony rearrests included many drug crimes, but the majority were for crimes against persons or property, or for other felony offenses.*[31]

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[30] The NIJ study provides no data on convictions, as opposed to arrests and declinations. The decision to focus on arrests was "due to inconsistencies in recording dispositional information on the police files of the defendants in [the] samples." *NIJ Report* 8.

[31] Crimes against persons or property, as defined in the NIJ study, included assault, murder, rape, robbery, burglary, grand theft and grand auto theft. *NIJ Report* 16.

Given these findings, it simply cannot be denied that the exclusionary rule contributes significantly to the Nation's crime problem.[32]

But even if the numerical impact of the exclusionary rule were to be discounted, the rule exacts an exceedingly high societal cost. The Court has noted that the exclusionary rule may well serve to lessen public respect for the judicial system. "Thus, although the rule is sought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice." *Stone* v. *Powell*, 428 U.S. at 490-491. Moreover, indiscriminate application of the exclusionary rule may foster a public perception that the courts are simply unaware of reality. See *Bivens*, 403 U.S. at 415 (Burger, C.J., dissenting) (deterrent rationale is "hardly more than a wistful dream").[33]

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[32] We do not venture to predict that modification of the exclusionary rule will, by itself, ensure reduction of the crime rate to a material extent. Rather, as a Department of Justice representative testified before Congress (*Statement of D. Lowell Jensen, Assistant Attorney General, Criminal Division, United States Department of Justice, Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 3 (June 2, 1982)):

> Any thoughtful consideration of contemporary crime must recognize, unfortunately, that there are no panaceas. On the other hand, advocates for reform [of the exclusionary rule] do point out that the rule operates to free known murderers, robbers, drug traffickers and other violent and non-violent offenders and that a rule of evidence which has such a result without a reasonable purpose to support it is intolerable.

[33] It may be significant in this regard that "no other civilized country has adopted our mandatory rule of the exclusion

In part, this problem of public perception arises because the exclusionary rule, as currently applied, lacks the vital ingredient of proportionality.[34] As the Chief Justice observed in his concurrence in *Stone* v. *Powell*, 428 U.S. at 490 (footnote omitted): "The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice."[35] This cost of the exclu-

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of probative material evidence because of police misconduct." Wilkey, *supra*, 1 Crim. Just. Ethics at 23. Moreover, the decision of other countries *not* to adopt an exclusionary rule has come only after careful and deliberate study. See, *e.g.*, *id.* at 23-24 & nn. 26-35.

[34] Prompted by the belief "that any remedy for the violation of a constitutional right should be proportional to the magnitude of the violation," the Attorney General's Task Force on Violent Crime has recommended the adoption of a reasonable good-faith exception to the exclusionary rule. *Attorney General's Task Force on Violent Crime, Final Report* 55-56 (1981).

[35] Judge Wilkey has made the same point, perhaps more graphically, dissenting in *United States* v. *Ross*, *supra*, 655 F.2d at 1208:

> [The] penalty [of the exclusionary rule] is administered with a sense of proportionality reminiscent of those medieval penal systems that prescribed capital punishment for everything from pickpocketing on up. The rule falls mercilessly on evidence deemed to have been seized unconstitutionally, without regard for the gravity of the police misconduct or the seriousness of the crime of which the defendant has been charged. Even if the policeman's actions were only marginally in violation of the Constitution despite his good faith while the criminal is guilty of rape and murder, still the evidence stays out. Such a disproportion would be regarded as barbaric if used to deter crime; ironically, employed to deter the police many apparently consider it "progressive."

sionary rule is particularly evident in a case such as the present one, where it cannot seriously be urged that the police engaged in any misconduct. See pages 44-45, *supra*. On the other hand, there can be little doubt that the suppressed evidence, if admitted, would conclusively establish the respondents' guilt.

The chilling effect on legitimate police activities is another less visible but equally important cost specifically associated with suppression of evidence garnered in good faith violations of the Fourth Amendment. As the circumstances surrounding a particular proposed course of action bring it closer to the indistinct line often separating lawful from unlawful searches or seizures, a relentless application of the exclusionary rule is increasingly likely (accepting arguendo the premise of deterrence on which the rule depends) to deter the former rather than the latter, since almost by definition this class of situations is as likely to involve legal as illegal police activity. To the extent the rule operates to discourage the police from reasonable and proper investigative actions, it carries with it the truly deplorable consequence of unreasonably preventing the solution and, worse yet, prevention of crime. Once application of the rule approaches the point at which it is as likely to chill legitimate police action as to discourage marginally improper action, powerful justifications indeed are needed to justify such results.[36]

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[36] The Court has recognized the same point in holding that public officials enjoy at least qualified immunity in civil damage actions brought under 42 U.S.C. (Supp. IV) 1983. In *Scheuer* v. *Rhodes*, 416 U.S. 232, 242 (1974), the Court observed:

> Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this

Still another cost of the exclusionary rule is its failure to provide any remedy for the innocent victims of unlawful searches and seizures. Even for the criminal defendant, the primary effect of the rule's application—aiding him to secure an acquittal even though he is guilty—does not itself repair the breach of privacy that the Fourth Amendment protects. See page 13, *supra*. And the exclusionary rule is, of course, an entirely meaningless "remedy" when the victim of the unlawful search is never accused of a crime. See *Bivens*, 403 U.S. at 410 ("[f]or people in Bivens' shoes, it is damages or nothing"); *id.* at 415-416, 417-418 (Burger, C.J., dissenting).

A further cost of the exclusionary rule, often paid insufficient attention, is the burden it places on the judicial system. One-third of federal defendants going to trial file Fourth Amendment suppression motions, and 70% to 90% of these involve formal hearings. *GAO Report* 10. Although most of these motions are denied (*ibid.*), the effect on judicial and prosecutorial resources is the same as if the motions were meritorious. Significantly, the result of this diversion of resources from criminal trials to pre-trial motions may have its harshest impact on innocent defendants. See *United States* v. *Ross*, 655 F.2d at 1205-1206 (Wilkey, J., dissenting):

> To understand how the innocent defendant is victimized by the diversion of scarce resources from criminal trials to police discipline, it is necessary briefly to consider how our criminal justice system now operates in fact, if not in theory.

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and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.

* * * [It] ensures that more due process will be required than the system can afford to pay for. As a result, trials have now been priced too high to be held in most circumstances * * *.

Instead, we have come increasingly to rely on an informal system of negotiated settlements in the form of plea bargained arrangements between prosecutor and defendant. The results are woeful. Criminals guilty of grievous offenses routinely are permitted to escape with convictions for crimes far less serious carrying only wristslapping penalties. Meanwhile innocent defendants who might well have been vindicated at trial are coerced into settling for a conviction on a lesser charge * * *.

It is against this background that we must measure the diversion of energy, talent and dollars from the central task of fairly determining the guilt and innocence of defendants into the work of adjudicating whether the police have blundered. * * * That function should be performed elsewhere and by others. The exclusionary remedy thus literally buys what little in the way of Fourth Amendment protection it affords at the cost of more trials for criminal defendants. Even if the rule did a fair job of promoting Fourth Amendment values, this would be at best a questionable bargain.[37]

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[37] The workload generated by the exclusionary rule does not, of course, cease at the trial court level. For example, Judge Wilkey has pointed out that, over a three-year period, 22.1% of the published opinions of the United States Court of Appeals for the District of Columbia Circuit in criminal cases involved suppression issues. M. Wilkey, *Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule* 95 F.R.D. 211, 220 (1982). And, during this Term alone, this Court will hear argument in no fewer than 11 cases involving

Finally, the exclusionary rule in the long run threatens the very Fourth Amendment values it is intended to safeguard. "If one were diabolically to attempt to invent a rule sure slowly to undermine the substantive reach of the Fourth Amendment, it would be hard to do better than the exclusionary rule." *United States* v. *Ross*, 655 F.2d at 1206 (Wilkey, J., dissenting). This is because of the obvious reluctance of judges to condemn questionable practices under the Fourth Amendment when they know that the result of their decision will be the freeing of a guilty defendant. The Court has noted the same effect in considering the permissibility of a retrial under the Double Jeopardy Clause (*United States* v. *Tateo*, 377 U.S. 463, 466 (1964); emphasis added):

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has ob-

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Fourth Amendment search and seizure issues. *Texas* v. *Brown*, No. 81-419; *Illinois* v. *Gates*, No. 81-430; *United States* v. *Villamonte-Marquez*, No. 81-1350; *United States* v. *Place*, No. 81-1617; *Florida* v. *Brady*, No. 81-1636; *United States* v. *Knotts*, No. 81-1802; *Illinois* v. *Andreas*, No. 81-1843; *Illinois* v. *Lafayette*, No. 81-1859; *Florida* v. *Royer*, No. 80-2146; *Florida* v. *Casal*, No. 81-2318; *Michigan* v. *Long*, No. 82-256. These 11 cases represent nearly half of the 25 criminal cases the Court is likely to hear this Term. This expenditure of judicial resource on suppression issues continues unabated even though "the general principles applicable to claims of Fourth Amendment violations are well settled * * *." *Arkansas* v. *Sanders*, 442 U.S. 753, 757 (1979). The most plausible explanation for this phenomenon, of course, is that the windfall benefits of the exclusionary rule for guilty defendants are so great that they effectively negate the likelihood of meaningful self-screening.

> tained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. *From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.*

Similar concerns operate in the context of the exclusionary rule. In addition, public support for the values served by the Fourth Amendment can too easily be undermined by a general perception that Fourth Amendment jurisprudence is bringing about the seemingly unjustified release into society of dangerous criminals. Thus, the rule cannot help but threaten the substantive safeguards of the Fourth Amendment.

D. The Objections To A Good-Faith Exception To The Exclusionary Rule Are Insufficient To Overcome The Need For Modification

We think it evident that the foregoing cost-benefit analysis of the exclusionary rule demonstrates the need for a properly designed good-faith exception to the rule. Although many of the practical details concerning the application of such an exception are best left to future cases and initial resolution by lower courts, cf. *United States* v. *Williams*, 622 F.2d at 847; *United States* v. *Nolan*, 530 F. Supp. at 399, we shall undertake briefly, and in general terms, to

respond to some of the most commonly-voiced objections to our proposal.

1. Critics of a good-faith exception to the exclusionary rule invariably argue that it would "put[] a premium on 'police ignorance.' " [38] This is a palpable strawman. As the Fifth Circuit explained in *United States* v. *Williams*, 622 F.2d at 841 n.4a, the test for applying the exception is essentially an objective one:

> We emphasize that the belief, in addition to being held in subjective good faith, must be grounded in an objective reasonableness. It must therefore be based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully. Thus, a series of broadcast breakins and searches carried out by a constable—no matter how pure in heart—who had never heard of the fourth amendment could never qualify.

See also *United States* v. *Nolan*, 530 F.Supp. at 399; *People* v. *Adams*, 53 N.Y.2d at 9-10, 422 N.E.2d at 541; Carrington, *Good Faith Mistakes and the Exclusionary Rule*, 1 Crim. Just. Ethics 35, 38-39 (1982); Schroeder, *supra*, 69 Geo. L.J. at 1420; Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. Crim. L. & Criminology 635, 655 (1978); cf. *Scott* v. *United States*, 436 U.S. 128, 137-138 (1978).

Thus, a modification of the exclusionary rule that focuses on the objective reasonableness of an officer's actions will not foster official disregard for the law. Because such an objective standard requires individual officers to have a reasonable knowledge of what the law prohibits, see *United States* v. *Peltier*, 422

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[38] See, *e.g.*, Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, 1 Crim. Just. Ethics 28, 32 (1982).

U.S. at 542; *United States* v. *Ajlouny*, 629 F.2d at 841; *United States* v. *Nolan*, 530 F. Supp. at 399, the adoption of a good-faith exception may actually enhance, but in any event certainly will not discourage, efforts to educate police officers about the extant principles of law. To avoid the risk of suppression through unreasonable ignorance, police departments can be expected (assuming validity in the hypothesis of deterrence by which the rule is justified in the first place) to ensure that individual officers are reasonably well-trained, especially as the extent to which a police department takes seriously its duty of providing training and guidance to officers in the field might well be considered in determining whether the exclusionary rule should be invoked. See Kaplan, *supra*, 26 Stan. L. Rev. at 1050-1051.

2. Because the focus of the inquiry will be objective reasonableness, rather than an officer's subjective intent, the good-faith exception we propose is not likely to burden the courts unduly. Generally, it will be unnecessary for courts to engage in unwieldy and awkward inquiries into the subjective intent of arresting or searching officers.[39] Instead, a good-faith

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[39] The Fifth Circuit apparently envisions the good-faith exception as entailing both a subjective and an objective prong, see *United States* v. *Williams*, 622 F.2d at 841 n.4a, whereas the New York Court of Appeals believes the test should be strictly objective, see *People* v. *Adams*, 53 N.Y.2d at 9-10, 422 N.E.2d at 541. This Court has determined, for reasons only partially applicable in the present context, that the good-faith defense in civil damage actions for alleged constitutional torts should have only an objective component. *Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982). It has mentioned but not resolved the question with respect to the exclusionary rule in *Scott* v. *United States*, 436 U.S. 128, 135-136 (1978). In our view, the test should probably be only objective, for it seems

exception would require only an objective assessment of the officer's conduct in light of the factual circumstances of a particular case and the extent to which the governing legal principles have been predictably articulated. It will, therefore, merely require courts to make determinations of a kind that are not materially different from those they presently make in ruling upon suppression motions.[40]

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unlikely that there will be many occasions on which a reasonable officer could have entertained a good-faith belief that his action was proper, but the particular officer did not do so; the inclusion of a subjective component will therefore rarely alter the result but would instead merely produce burdensome and largely unproductive litigation. It is possible, however, to imagine cases in which the objective reasonableness of a belief in the legality of particular conduct could be overcome by a showing that, for example, the victim of the search was singled out for harassment. In such circumstances, a subjective inquiry might be appropriate. Plainly, no such circumstances exist here, so decision of this point is not essential to the Court's present task.

[40] Even if additional burdens were imposed, Judge Friendly has suggested that they would be preferable to the current system (H. Friendly, *Benchmarks, supra*, at 262; footnotes omitted):

> It is no sufficient objection that such a rule would require courts to make still another determination; rather, the recognition of a penumbral zone where mistake will not call for the drastic remedy of exclusion would relieve them of exceedingly difficult decisions whether an officer overstepped the sometimes almost imperceptible line between a valid arrest or search and an invalid one. Even if there were an added burden, most judges would prefer to discharge it than have to perform the distasteful duty of allowing a dangerous criminal to go free because of a slight and unintentional miscalculation by the police.

3. It is sometimes suggested that the exclusionary rule is needed to provide Fourth Amendment cases for the courts to adjudicate. See, *e.g.*, Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 Hastings L. J. 1065, 1074 (1982); Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 Wash. U.L.Q. 621, 654-656; Oaks, *supra*, 37 U. Chi. L. Rev. at 756. "The risk [in modifying the exclusionary rule] is that our constitutional rights will atrophy." Geller, *supra*, at 655 (footnote omitted).

This presumed risk should be placed in proper perspective. Assuming, arguendo, that adoption of a good-faith exception to the exclusionary rule would substantially reduce the incentive for defendants to litigate substantive Fourth Amendment questions, the Court should bear in mind that the lost decisionmaking opportunities will be confined to the "grey, twilight area[s]" of Fourth Amendment law where the constitutional violation, if any, is minimal. In these areas at least, it would seem that our society would reap greater benefits from a more rational application of the exclusionary rule than from continued judicial resolution of every Fourth Amendment question that inventive lawyers can devise. Just as there is a point of diminishing returns in the application of the exclusionary rule,[41] so too there is a point at which decisions of only marginal constitutional significance may be overpriced.

In any event, we are extremely skeptical about the validity of any assumption that defendants will lose their incentive to litigate substantive Fourth Amend-

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[41] Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 389 (1964).

ment questions if confronted with a good-faith exception to the exclusionary rule. The overwhelming lack of success of most suppression motions (see page 53, *supra*) does not seem to have had any effect on the number of such motions filed. Practical experience tells us that criminal defendants commonly assert suppression claims with little regard for their ultimate chances of success—in part, no doubt, because of the magnitude of the benefit to them if "lightning" should strike. While adoption of a good-faith exception will tend to discourage presentation of substantively insubstantial Fourth Amendment suppression motions, it thus seems highly improbable that litigation of colorable Fourth Amendment issues will "atrophy" to any significant degree.

Although the number of cases may not materially decline, there would be an important easing of the judicial workload because it would no longer be necessary for courts to decide every conceivable question of Fourth Amendment law. The application of established law to the circumstances of a particular search and seizure to determine good faith will generally be an easier undertaking than resolution of the underlying legal question and should thus result in important advances for the cause of judicial economy.

On the other hand, we see no jurisprudential impediment to a court's undertaking to decide important, recurrent, and unsettled substantive Fourth Amendment questions even when the good-faith exception may control the outcome of the particular case. Instead, we view the issue of whether to decide the substantive question first or to dispose of a case strictly on the basis of good faith as one best committed to judicial discretion. In nonrecurring, fact-bound situations, a court might well conclude that little pur-

pose is served by unnecessarily adjudicating the Fourth Amendment question. On the other hand, significant legal issues or particularly problematic factual situations of concern to a court could still be considered.[42]

This would be comparable to the approach now employed by the Court in applying the harmless error doctrine. In some cases, the Court exercises its discretion to decide the merits of a claim even though the error was harmless, while in others it resolves the case solely by reliance on the harmless error doctrine. Compare, *e.g.*, *Milton* v. *Wainwright*, 407 U.S. 371, 372 (1972) (Court declines to decide whether admission of confession was constitutional violation because error, if any, was harmless beyond a reasonable doubt), with *Coleman* v. *Alabama*, 399 U.S. 1 (1970) (Court holds defendants constitutionally entitled to counsel at preliminary hearing, but remands to state court for determination whether denial of counsel was harmless error);[43] see also *United States*

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[42] *United States* v. *Ajlouny*, 629 F.2d at 841-842, offers a good example of a court's sound exercise of discretion in *declining* to decide the legality of a search in light of the applicability of a good-faith exception. The legal question involved warrantless national security wiretaps. Subsequent to the surveillance of Ajlouny, the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. (Supp. IV) 1801-1811, became effective. That Act, by requiring prior court approval for nearly all foreign intelligence surveillance, "substantially reduced the importance of deciding in this case whether the Constitution independently requires the obtaining of a warrant for foreign intelligence electronic surveillance" (629 F.2d at 842). Accordingly, the court disposed of the case by relying on the good-faith exception.

[43] The courts of appeals routinely exercise similar discretion in applying the harmless error doctrine. Compare, *e.g.*, *United States* v. *West*, 670 F.2d 675, 684-687 (7th Cir.

v. *Blackwell*, No. 82-1261 (D.C. Cir. Dec. 10, 1982), slip op. 31 n.22 (court explains reasons for deciding constitutional question before determining there was no "plain error"). Accordingly, the fear that Fourth Amendment law will become "frozen" in its current state seems groundless.

4. Finally, both supporters and critics of the exclusionary rule have expressed reluctance about modifying it in the absence of an effective alternative. See, *e.g.*, *Bivens*, 403 U.S. at 415, 420-421 (Burger, C. J., dissenting); Goodpaster, *supra*, 33 Hastings L. J. at 1100; Geller, *supra*, 1975 Wash. U.L.Q. at 688. If the exclusionary rule were actually capable of deterring good-faith police mistakes, this concern would have some force. We have already noted, however, as has the Court (see pages 20-23, *supra*), that there is at most an impressionistic basis for the assumption that the exclusionary rule in fact deters police misconduct. More importantly, in many of the cases to which a good-faith exception would apply, such as the instant one, there is no misconduct to deter. Under these circumstances, it simply makes no sense to hold on to a demonstrably costly "remedy" that is incapable of achieving its stated purpose. In our submission, the exclusionary rule must be evaluated on its own merits; if it fails to accomplish its objective, it should be appropriately modified, irre-

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1982); *United States* v. *Bulman*, 667 F.2d 1374, 1382-1384 (11th Cir. 1982); *Harryman* v. *Estelle*, 616 F.2d 870, 879 (5th Cir. 1980) (en banc); *United States* v. *Rosales-Lopez*, 617 F.2d 1349, 1355-1356 (9th Cir. 1980), aff'd, 451 U.S. 182 (1981), with, *e.g.*, *United States* v. *McCulley*, 673 F.2d 346, 352 (11th Cir. 1982); *United States* v. *Civella*, 666 F.2d 1122, 1130 (8th Cir. 1981); *United States* v. *Torres*, 659 F.2d 1012, 1013 (9th Cir. 1981), cert. denied, 455 U.S. 926 (1982).

spective of the efficacy of the alternatives that might be substituted.

In any event, a number of alternatives have been suggested. See, *e.g.*, Wilkey, *supra*, 1 Crim. Just. Ethics at 24-26 (suggests executive branch disciplinary boards, civil tort remedies, or "mini-trials" for offending officers following the main criminal trial); Goodpaster, *supra*, 33 Hastings L. J. at 1100-1107 (recommends administrative agency regulation of police conduct). Whether any of these alternatives will be effective cannot be known until they are tested; what should be obvious, however, is that the alternatives cannot possibly be any *less* effective than the exclusionary rule in its current form for cases like the present one. Moreover, as has been noted by others, the continued existence of the exclusionary rule may itself actually inhibit experimentation with different approaches by the political branches of government. See *Stone* v. *Powell*, 428 U.S. at 491 (Burger, C. J., concurring); *United States* v. *Ross*, 655 F.2d at 1208 (Wilkey, J., dissenting); Schroeder, *supra*, 69 Geo. L. J. at 1385. Accordingly, we submit that the presence or absence of immediately available effective alternatives is simply not a controlling consideration in deciding whether the current rule requires the kind of modification that we propose.

CONCLUSION

The judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted.

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Reply Brief for the United States

Permission to file the following Reply Brief Amicus Curiae was denied by the Court on February 28, 1983 (see Docket Sheet at end of case). It is included here in the interest of providing a complete record of this case.

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No. 81-430

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF ILLINOIS, PETITIONER

v.

LANCE GATES, ET UX.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

APPLICATION FOR SPECIAL LEAVE TO FILE A REPLY BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL AND REPLY BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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v.

LANCE GATES, ET UX.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

APPLICATION FOR SPECIAL LEAVE TO FILE A REPLY BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The Solicitor General, on behalf of the United States, respectfully applies for special leave to file a reply brief for the United States as amicus curiae.

In response to this Court's order of November 29, 1982, restoring this case to the calendar for reargument, the United States filed a supplemental brief as amicus curiae supporting reversal, in which we urged the Court to modify the Fourth Amendment exclusionary rule so as not to require the exclusion of evidence obtained in the mistaken but not unreasonable belief that the search and seizure in question did not violate the Fourth Amendment. We recognize, of course, that Rule 36.2 of the Rules of this Court does not countenance a reply brief from an amicus curiae. Nevertheless, we respectfully submit that an exception to the rule is justified by the unusual circumstances of this case, in which

respondents' brief and those of the many amici supporting respondents devote at least equal if not greater efforts to responding to the arguments of the United States than to those advanced by petitioner. Special leave is particularly appropriate in light of the unquestioned substantiality of the interest of the United States in this case. As we have previously noted, few issues in the area of criminal law are of more importance to the United States than the proper application of the exclusionary rule. The United States has as substantial an interest in the outcome of this case as if it were a party and, indeed, respondents and their supporting amici have responded to the United States' brief as if we were in fact a party. Accordingly, we believe that the Court's consideration of this vitally important case would be assisted by a reply brief from the United States.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1983

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REPLY BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

For the most part, respondents and the amici supporting them counter our arguments in favor of a "reasonable mistake" exception to the exclusionary rule with dire predictions about the demise of the Fourth Amendment and the values it protects. Respondents and their amici have largely chosen to ignore the fact that continued application of the exclusionary rule in the class of cases to which a reasonable good-faith exception would apply—*i.e.*, those near the often indistinct boundary between good police work and impropriety—is as likely to deter the police from performing their job as it is to encourage compliance with the Fourth Amendment. The American Bar Association asserts that the Fourth Amendment is too important to take this concern into account (ABA Br. 3 n.1). The United States yields to no one in its respect for the Fourth Amendment, but we submit that nothing in our proposal threatens to

undermine its fundamental values. Any fair reading of our opening brief should dispel respondents' exaggerated concerns; indeed, as we previously noted (Br. 40-41, 55-56), the common-sense modification of the exclusionary rule that we propose should serve to strengthen the substance of the Fourth Amendment.

Most of the other arguments against modification of the exclusionary rule have similarly been anticipated and answered in our opening brief. Accordingly, we deem it unnecessary to respond further to most of the arguments advanced by respondents and their amici, and we confine this reply to a few central points.

1. Putting to one side unsubstantiated rhetorical flourishes, respondents and their supporting amici mount no credible argument that the modification of the exclusionary rule that we propose would undermine the existing incentives for police adherence to *settled* Fourth Amendment norms. Any such argument would be untenable, for the exclusionary rule would continue to apply in essentially unchanged form to evidence seized in clear violation of established constitutional principles; thus, whatever deterrence the rule now provides would continue largely undiminished. Rather, the linchpin of their argument is the assertion that adoption of a "reasonable mistake" exception to the exclusionary rule would "freeze" Fourth Amendment jurisprudence in its present state because the courts would be thereafter disabled from adjudicating new or unsettled issues by the likelihood that a disposition of the issue in the defendant's favor would nevertheless not lead to reversal of his conviction. Jurisprudential principles rooted in Article III thus would, it is asserted, preclude the courts from deciding substantive constitutional search and seizure issues, and the exclusionary rule would no longer provide a

vehicle for new constitutional adjudications to guide future behavior of law enforcement officials. This line of argument is multiply flawed.

a. There is no serious dispute that the fundamental justification for the exclusionary rule resides in its hoped-for effect of securing governmental obedience to the dictates of the Fourth Amendment as explicated by the courts. There is, however, a significant difference between that purpose and the purpose ascribed to the rule by the American Bar Association, the American Civil Liberties Union, and others opposing our position, *viz.*, to create for the courts opportunities to render new constitutional adjudications. Any such justification for the exclusionary rule is surely a classic example of the tail wagging the dog. To anyone but a lawyer, and even to many lawyers, the idea that the exclusionary rule must be retained in its present form in order to perpetuate opportunities for litigation must seem absurd. Preserving a rule of evidence that is as demonstrably costly and ineffective as the exclusionary rule (in the class of cases here considered) for the purpose of assuring a continued flow of litigation is surely beyond the proper limits of the judicial function. Indeed, it is particularly ironic for the ACLU to support its argument that the exclusionary rule is needed to provide constitutional cases for the courts to adjudicate by reliance on this Court's cases cautioning against the unnecessary resolution of constitutional issues (ACLU Br. 28-29).

b. Even if respondents and their amici were correct in their contention that adoption of a "reasonable mistake" exception to the exclusionary rule would deprive suppression motions of their status as vehicles for resolution of heretofore unsettled issues of substantive Fourth Amendment law (a proposition we examine below), many of the

more important and recurring issues of this nature can be resolved in other types of judicial proceedings. For example, although there are no doubt limits on the circumstances in which such actions will lie (*e.g., Rizzo* v. *Goode*, 423 U.S. 362 (1976)), a pattern or practice of official conduct that is alleged to violate Fourth Amendment rights can often be challenged by an aggrieved individual in a suit for declaratory and injunctive relief. The warrant/subpoena issue decided by this Court in *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), is one example of such litigation. The "border search" practice condemned by this Court in *Torres* v. *Puerto Rico*, 442 U.S. 465 (1979), is another issue that unquestionably could have been resolved as well in an action for declaratory relief by a regular traveler to Puerto Rico who was subjected to such searches upon arrival. The same is true of the checkpoint stop issue resolved in *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), the validity of suspicionless boat stops for document inspections in inland waters, now before the Court in *United States* v. *Villamonte-Marquez*, No. 81-1350 (argued Feb. 23, 1983), and the constitutionality of INS factory inspection procedures, ruled upon by the Ninth Circuit and presented in our petition for a writ of certiorari in *INS* v. *Delgado*, No. 82-1271 (filed Jan. 28, 1983).

It is true that not every arguably unconstitutional practice will be amenable to review in a suit for declaratory or injunctive relief, for such suits require a proper plaintiff, *i.e.*, one who has a reasonable fear of future exposure to the challenged practice. The nature of this requirement is one of the questions now being considered by the Court in *City of Los Angeles* v. *Lyons*, No. 81-1064 (argued Nov. 2, 1982). But even if no individual may be sufficiently exposed to risk of future injury to bring an action for declaratory or injunctive relief, damages actions against municipalities under 42 U.S.C. (Supp. V) 1983 also afford an avenue for substantive

judicial review of the validity of many questionable police practices. Although a municipality is not liable under Section 1983 on a theory of *respondeat superior*, local governing bodies *are* subject to suit for constitutional torts resulting from implementation of local ordinances, regulations, policies, or even customary practices. *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). And by virtue of the holding in *Owen* v. *City of Independence*, 445 U.S. 622 (1980), such entities enjoy no good faith defense that might impede resolution of the substantive constitutional issue. Consequently, for example, the validity of the policy of a local police force to make random, suspicionless stops of automobiles to enforce motor vehicle licensing and registration laws, decided by this Court in *Delaware* v. *Prouse*, 440 U.S. 648 (1979), could as well have been decided in a damages action by a motorist who had been unlawfully stopped (without even the cost of letting a single guilty offender go free). Similarly, the validity of police automobile inventory practices, passed upon in *South Dakota* v. *Opperman*, 428 U.S. 364 (1976), could instead have been adjudicated in a civil action.

Finally, it may be predicted with some assurance that even if this Court modifies the exclusionary rule as we have proposed, a number of state courts will decline to follow its lead as a matter of state law and will continue to suppress evidence in state trials for any Fourth Amendment violation. This Court should therefore still have available a sufficient supply of state criminal cases in which to resolve important, unsettled questions of Fourth Amendment law. We mention in this connection respondents' argument (Resp. Br. 6-10) that the exclusionary rule issue should not be decided in the present case because Illinois had its own exclusionary rule prior to *Mapp* v. *Ohio*, 367 U.S. 643 (1961), without regard to the merits of this argument in the

particular case of Illinois (which has not indicated that its exclusionary rule would be different from or broader than the general federal rule), we note merely that acceptance of the argument would result in the Court's deciding the substantive Fourth Amendment issue on which it initially granted review.

Perhaps the various avenues for substantive constitutional adjudication discussed above would not provide as fast and furious a supply of Fourth Amendment issues as does the present form of the exclusionary rule, but there is no basis for concluding that important, recurrent issues need go too long unresolved even if modification of the exclusionary rule were to diminish substantially the number of criminal cases in which resolution of such issues is essential. Accordingly, there need be no fear that Fourth Amendment law will become "frozen" in its current state.[1]

c. In any event, as we noted in our opening brief (at 62-63 & n.43), there is no jurisdictional bar to a court's deciding a question of Fourth Amendment law even if the outcome of the case may in the end be controlled by application of a good-faith exception to the exclusionary rule. The ACLU's reliance on Article III is misplaced.[2] At bottom, the

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[1]If respondents and their amici are correct in their assertion that a good-faith exception to the exclusionary rule would "freeze" the development of Fourth Amendment law, then it logically follows that the Court unwittingly "froze" the development of other constitutional rights when it approved a good-faith defense for Executive Branch officials sued for damages in *Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982), that is essentially the same as what we propose here. We doubt that the Court thought it was doing any such thing or, if it was, that the outcome of the case should have turned on the effect the decision would have on opportunities for future litigation.

[2]Respondents and their amici offer no explanation for the numerous cases noted in our opening brief (at 62-63 & n.43) in which courts decide the merits of Fourth Amendment claims before deciding that the error,

ACLU's argument is that courts are constitutionally required to limit their opinions to the bare minimum necessary to make a dispositive judgment of the particular case. This position reads far more into Article III than this Court has ever suggested. Nothing in Article III prevents a court from analyzing the issues presented by a suppression motion in whatever order it deems most appropriate. The essence of Article III is that the judicial power be exercised only in live controversies presenting concrete disputes between adversaries. See, *e.g., Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). There can be no doubt that a defendant who claims that he has been subjected to an unlawful search or seizure and seeks suppression of the evidentiary fruits thereof raises a live controversy within the Article III authority of federal courts to adjudicate. And, as a matter of logic, it is surely appropriate for a court to decide whether there has been a wrong before deciding what remedy to impose.

Conceptually, this is no different from countless other situations in which a claimant must clear more than one hurdle before establishing his entitlement to relief. For example, nothing in Article III requires a court to decide a plaintiff's entitlement to damages before it decides the question of liability, even though a holding that the plaintiff is entitled to no damages would render decision of the liability issue unnecessary. Logically, a court would almost always determine liability before it considers relief, and the situation here would be no different. Respondents and their amici also ignore the possibility that the Fourth Amendment issue is potentially dispositive of the entire controversy, if it is resolved in the prosecution's favor (making it

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if any, was harmless. Yet respondents' position would require the conclusion that all of those rulings were beyond the power of the courts to make.

unnecessary to consider the applicability of a good-faith exception). Instead, they apparently would require a court to organize its consideration of a case backwards, looking always to find any affirmative defense that might defeat relief before examining the substance of the claim.[3]

This Court has never suggested that such a practice is required. Indeed, in *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975), the Court followed precisely the procedure that, according to the ACLU, would violate Article III. In that case, the Court first held that respondent had been unconstitutionally deprived of his right to liberty through confinement in a mental institution (422 U.S. at 573-576). The Court then remanded the case for the court of appeals to consider petitioner's claim of a good-faith immunity defense in light of the intervening decision in *Wood* v. *Strickland*, 420 U.S. 308 (1975). Had the Court accepted the ACLU's view of Article III, it necessarily would have remanded the case without deciding the Fifth Amendment claim.

The ACLU's error lies in confusing the case or controversy requirement of Article III with the *jurisprudential* policy of this Court to avoid unnecessary constitutional decisions. That long-established policy is beyond reproach, and we do not suggest that the Court depart from it as a general rule. But neither should the Court turn a prudential guideline into rigid constitutional doctrine (cf. *Hagans* v. *Lavine*, 415 U.S. 528, 546 (1974) ("[t]he doctrine is not ironclad * * *")). When sound reasons exist for departing

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[3]In the civil context, " 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official." *Harlow* v. *Fitzgerald*, *supra*, slip op. 14; *Gomez* v. *Toledo*, 446 U.S. 635 (1980). If the same analytic framework were to apply in the context of a good-faith exception to the exclusionary rule, a court surely would be free to consider the defendant's claim of a Fourth Amendment violation before taking up the prosecution's assertion of an affirmative defense.

from the general policy, Article III imposes no barrier against doing so. Thus, although courts clearly are not compelled to decide constitutional questions that may not dispose of a case, there is no error in doing so, especially when the "questions are otherwise properly before [the court] and may be resolved without imposing * * * additional litigative burdens." *Davis* v. *Passman*, 442 U.S. 228, 236 n.11 (1979).[4]

Cases raising novel or unresolved but important and recurrent search and seizure questions might well present appropriate situations for the courts to depart from their normal practice, because the prudential reasons for avoiding unnecessary constitutional decisions would be outweighed by a perceived need to provide law enforcement officers with guidance concerning lawful conduct. The constitutional ruling in such cases would not be a prohibited advisory opinion because, as noted above, it is clear that the

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[4]The ACLU relies (ACLU Br. 29) on the Court's dictum in *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967), suggesting that Article III requires the Court to give the benefit of a new constitutional ruling to the party in whose case the rule is first announced. This aspect of *Stovall*, however, has been roundly criticized. See Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557, 1615 (1975) (footnote omitted):

> Stated bluntly, the "chance beneficiary" notion, developed in *Stovall* and relied on in *Desist* [v. *United States*, 394 U.S. 244 (1969)] and other cases, is not and never was required by article III. Cases in which a new rule is adopted but applied in a wholly prospective fashion are nonetheless decided on the merits. Although with a prospective holding the result in the law-changing case turns on the old rule, not the new one, that fact does not remove the case from the category of an article III case or controversy. If it did, the Court would have acted improperly (indeed, unconstitutionally) in *England* [v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964)], *Cipriano* [v. *City of Houma*, 395 U.S. 701 (1969)], and the other cases adopting new rules for purely prospective application.

defendant would be presenting a live controversy concerning the requirements of the Fourth Amendment. The end result simply would be that, notwithstanding the constitutional violation, the defendant would not be entitled to the remedy of suppression.[5]

2. Respondents and the amici supporting them argue that it is logically impossible to defend a reasonable good-faith exception to the exclusionary rule because the result would be the creation of a category of "reasonable, unreasonable search[es]" (see, *e.g.*, Resp. Br. 33). The argument is nothing more than a play on words. It is true, of course, that once this Court has invalidated a particular practice under the Fourth Amendment, that practice is, by definition, "unreasonable." But it does not follow, as respondents would have it, that reasonable persons cannot differ about the presence or absence of probable cause. Indeed, in the category of cases to which a good-faith exception would apply, there will ordinarily be room for considerable difference of opinion concerning the reasonableness of the challenged practice. In any case in which this Court divides five to four on the question of probable cause, respondents apparently believe that either five or four Justices of this Court are "unreasonable" persons because they came to the "wrong" conclusion. Obviously, it is untenable to suggest

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[5]Even assuming *arguendo* some merit to the ACLU's position on this issue, the most it would support would be a small exception to the modification of the exclusionary rule that we propose. Most of the cases in which it would be appropriate to apply a reasonable mistake exception will involve sui generis factual situations that either are or are not compatible with established law. Whether or not courts would retain the power to decide such cases is relatively unimportant, because the decisions would be of little assistance in guiding future conduct in anything but precisely the same factual situation. Cases raising pure issues of Fourth Amendment law never before addressed are relatively rare, however, and it is only those cases to which the ACLU's argument has any relevance.

that in this area of the law there can be only one "reasonable" answer, notwithstanding the fact that there can be only one *final* answer.[6]

Respondents' argument also confuses the two entirely separate concepts of the wrong and the remedy. It does not follow that a search that is "unreasonable" in the sense that five Justices of this Court have said it is must be met with a rigid remedial prescription that may be unreasonably disproportionate to the violation. Rather, having found that a particular search or seizure was in violation of the Fourth Amendment, and therefore "unreasonable" as a matter of substantive Fourth Amendment law, a court should undertake a separate inquiry into the reasonableness of applying the exclusionary rule. This is a distinct facet of "reasonableness" that focuses not on the substance of the Fourth Amendment, but instead on the purposes to be served by the exclusionary rule. That there is no logical inconsistency in this approach is conclusively demonstrated by this Court's decisions in cases such as *United States* v. *Havens*, 446 U.S. 620 (1980); *United States* v. *Ceccolini*, 435 U.S. 268 (1978); *United States* v. *Calandra*, 414 U.S. 338 (1974); and *Alderman* v. *United States*, 394 U.S. 165 (1969) (see the discussion at pages 15-18 of our opening brief).[7]

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[6]Respondents spill much ink asserting that "[u]nder *any* test of probable cause," issuance of the warrant in this case was clearly "unreasonable." Resp. Br. 42; see also *id.* at 21-31, 39-42. It is a sufficient answer to this contention to note that two justices of the Illinois Supreme Court dissented (J.A. 13a-18a), and this Court found the question sufficiently close to grant certiorari.

[7]Respondents and their amici argue that the good-faith exception we advocate cannot be supported by cases such as those cited above, in which the Court has applied a cost-benefit analysis to application of the exclusionary rule. The ACLU's position (ACLU Br. 39-40) is that these cases all involved the collateral use of illegally obtained evidence, rather than the use of such evidence in the main criminal trial itself. The ACLU fails to account for this Court's decisions in the so-called "standing"

3. There is no basis for respondents' apocalyptic prediction that creation of a good faith exception to the exclusionary rule would result in the wholesale abdication by magistrates of their duty to make a reasoned decision on every application for a search warrant. As we noted in our opening brief (at 41-43), the exclusionary rule is intended to deter police misconduct, not judicial mistakes. Even if one accepts the premise that the exclusionary rule is capable of affecting police behavior in some circumstances, there is no basis whatsoever for assuming that it can have any impact on magistrates. Magistrates are not part of the law enforcement "team" (see *Coolidge* v. *New Hampshire*, 403 U.S. 443, 450-453 (1971)); as neutral judicial officers, magistrates have no stake in the outcome of any criminal prosecution, and the threat that evidence may be excluded from trial cannot logically be expected to have a significant deterrent impact on them. Instead, magistrates presumably are motivated—like all judicial officers—to reach a correct decision. The incentives for this behavior are in part supplied by appellate review, which, as we have demonstrated, would continue when needed even if a good faith exception were adopted. See pages 6-10, *supra*. Thus, contrary to the assertions of respondents and their amici, a good-faith exception would not create any new incentive for magistrates to be lax or remiss in their duties.

4. Respondents and their amici argue that a good-faith exception to the exclusionary rule is unworkable in practice because the fundamental standard of "reasonableness"

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cases. In our view, the nature of the proceeding, though relevant, is not the controlling inquiry; rather, the question is whether the "remedial objectives * * * [of the exclusionary rule will be] efficaciously served." *United States* v. *Calandra*, *supra*, 414 U.S. at 348. As we demonstrated in our opening brief, those objectives are not sufficiently served in situations in which the police cannot reasonably be expected to have known that their conduct would later be declared unlawful.

underlying the exception cannot be conclusively defined. But respondents and their amici ignore the fact that the "reasonable mistake" exception we propose turns on an objective assessment of the officer's conduct and would be determined in much the same manner as substantive Fourth Amendment questions are now decided. Subjective factors, such as an officer's good intentions, could not salvage a search that a reasonably well-trained police officer should have known to be in violation of the Fourth Amendment. Cf. *Harlow* v. *Fitzgerald, supra*, slip op. 14-18.

As we observed in our opening brief (at 56), articulation of the precise boundaries of a good-faith exception is best left to future cases and initial development by lower courts. But that is not to say that the standard's general outlines are not already clear: the reasonableness of an officer's conduct in a particular case would be judged against settled principles of Fourth Amendment law. The contention that a good-faith exception would put a premium on police ignorance is a strawman; by definition, a reasonably well-trained officer must have more than a passing familiarity with Fourth Amendment law. For the same reason, there would be no incentive for police departments to abandon training programs, or for individual officers deliberately to engage in searches of doubtful legality, because to do so would deprive them of the benefits of an objective good-faith exception.[8]

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[8]As respondents and their amici note, police training in the requirements of the Fourth Amendment has improved markedly since *Weeks* and *Mapp* were decided. See, *e.g.*, Drug Enforcement Administration, U.S. Dep't of Justice, *Legal Problems in Airport Interceptions of Domestic Drug Couriers* (1980). (A copy of this comprehensive training manual has been lodged with the Court in *Florida* v. *Royer*, cert. granted, 454 U.S. 1079 (1981).) But even the best-designed training program can do no more than educate officers as to the extant

CONCLUSION

For the foregoing reasons, as well as those stated in our prior brief, the judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1983

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principles of law. Hypothetical answers to unsettled questions as to which reasonable judges could differ cannot realistically serve as a guide for police conduct. Once the questions have been answered, however, the "reasonable mistake" exception we propose will increase the incentive for police departments to disseminate new rulings as rapidly as possible.

Opposition

ORIGINAL

No. 81-430

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE STATE OF ILLINOIS, PETITIONER

v.

LANCE GATES and SUSAN GATES, RESPONDENTS

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

OBJECTION TO REPLY BRIEF FILED BY THE UNITED STATES AS AMICUS CURIAE

Since Rule 36.2 states "no reply brief of an amicus curiae will be received", Respondents respectfully object to its being filed.

Respectfully submitted,

James W. Reilley

JAMES W. REILLEY
Attorney for Respondents

FEBRUARY 1983

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing "Objection to Reply Brief Filed by the United States as Amicus Curiae" upon the following:

REX E LEE
Solicitor General
Department of Justice
Washington, D.C. 20530

and

PAUL BIEBEL
First Assistant Attorney General
State of Illinois
160 N. LaSalle Street
Chicago, Illinois 60601

Dated this 23rd day of February, 1983.

Cheryl M Anderson

Subscribed and Sworn to
before me this 23rd day
of February, 1983.

Barry E Witlin
Notary Public

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Docket Sheet

NO. 81-430-CSY	TITLE	Illinois, Petitioner v. Lance Gates, et ux.

DOCKETED	COURT
Aug. 25, 1981	Supreme Court of Illinois

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Melbourne A. Noel, Jr.
	Counsel for Respondents: James W. Reilley, Paul P. Biebel, Jr. Clyde Woodrow Woody
Aug. 25, 1981	Petition for writ of certiorari filed. (Record filed).
Sept. 24, 1981	Order extending time to file a response to the petition until Oct. 30, 1981.
Oct. 29, 1981	Brief for the respondents in opposition filed.
Nov. 4, 1981	DISTRIBUTED. 11-25.
Dec. 1, 1981	REDISTRIBUTED. 12-4.
Jan. 4, 1982	REDISTRIBUTED. 1-8.
Jan. 11, 1982	Petition GRANTED.

Feb. 8, 1982	Motion of petitioner for leave to amend or enlarge question presented for review filed.
Feb. 10, 1982	DISTRIBUTED. 2-26. (Above motion)
Feb. 12, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until March 25, 1982.
Feb. 24, 1982	Respondent's answer to Motion for leave to amend or enlarge question presented for review filed.
Mar. 1, 1982	The motion of petitioner for leave to amend or enlarge question presented for review is DENIED.
March 10, 1982	Brief, amicus curiae, of the State of California filed.
March 24, 1982	Brief, amici curiae, of Americans for Effective Law Enforcement, Inc., joined by The Chicago Crime Commissio et al. in support of petition filed.
March 25, 1982	Brief, amici curiae, of Laws at Work (L.A.W.) joined by the states of Alabama, Arizona, et al. filed.
Mar. 27, 1982	Brief for the petitioner filed.
Mar. 27, 1982	Joint appendix filed.
Mar. 31, 1982	Brief, amicus curiae, for the U. S. filed.
Apr. 7, 1982	Order extending time to file the respondents' brief on the merits until May 28, 1982.
May 28, 1982	Brief for the respondants filed.
July 13, 1982	CIRCULATED.
July 14, 1982	Reply brief for the petitioner filed. (D).
	(Over)

81-430

Title

No.

DATE	PROCEEDINGS AND ORDERS
July 20, 1982	Motion of respondents for divided argument filed.
Sept. 9, 1982	The motion of respondents for divided argument is DENIED.
Oct. 13, 1982	ARGUED.
Nov. 18, 1982	REDISTRIBUTED. 11-24.
Nov. 29, 1982	This case is restored to the calendar for reargument. In addition to the question presented in the petition for certiorari and previously argued here, the parties are requested to address the question whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment. Dissenting opinion by Stevens, J. with whom Brennan, J. and Marshall J. join.
Dec. 28, 1982	Application for leave to file a brief as amicus curiae in excess of page limitations, and order granting same same by Stevens, J., 12/29/82. (Filed by the Solicitor General).
Jan. 12, 1983	Petitioner's brief on reargument filed.
Jan. 13, 1983	Brief, amici curiae, of Seven Former Members of the Attorney General of the United States' Task Force on violent crime (1981), et al. in support of Illinois filed.
Jan. 13, 1983	Supplemental brief for the United States as amicus curiae supporting reversal filed.
Jan. 14, 1983	Brief, amicus curiae, of National District Attorneys Association, Inc., in support of petitioners filed.
Jan. 15, 1983	Brief, amici curiae, of the State of Florida, et al. filed.
Jan. 17, 1983	Brief, amicus curiae, of the State of Illinois filed.
Jan. 21, 1983	CIRCULATED.
Jan. 27, 1983	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for argument filed.
Feb. 7, 1983	Motion of Florida for leave to participate in oral argument as amicus curiae and for additional time for argument filed.
Feb. 4, 1983	Application by California State Public Defender's Office for leave to file a brief as amici curiae in excess of page limitations, and order granting same by Stevens, J. 2/7/83, not to exceed 40 pages.

(Card No. 2)

NO. 81-430-CSY	TITLE Illinois, Petitioner v. Lance Gates, et ux

DOCKETED	COURT
Aug. 25, 1983	Supreme Court of Illinois

DATE	PROCEEDINGS AND ORDERS
Feb. 7, 1983	Application for leave to file respondents' brief on the merits in excess of page limitations, and order granting same by Stevens, J., 2/8/83, not to exceed 68 pages.
Feb. 11, 1983	Brief, amicus curiae, of The Legal Internship Program, Georgetown University Law Center filed. (D).
Feb. 11, 1983	Brief, amicus curiae, of The American Bar Association filed.
Feb. 11, 1983	Brief, amcius curiae, of The Association of Trial Lawyers of America filed. (D).
Feb. 14, 1983	Brief of respondents on reargument filed. (D).
Feb. 14, 1983	Brief, amicus curiae, for the Committee on Criminal Law of the Association of the Bar of The City of New York filed. (D).
Feb. 15, 1983	Brief, amicus curiae, of the Illinois State Bar Association filed. (D).
Feb. 15, 1983	Brief, amici curiae, of The National Association of Criminal Defense Lawyers, et al. filed. (D).
Feb. 15, 1983	Brief, amicus curiae, of National Legal Aid and Defender Association filed. (D).
Feb. 15, 1983	Motion of respondents for divided argument to permit amicus curiae American Bar Association to present oral argument as amicus curiae filed.
Feb. 16, 1983	Brief, amicus curiae, opposing the Establishment of a Good Faith Exception to the Elclusionary Rule filed. (D)
Feb. 17, 1983	Brief, amici curiae, for The American Civil Liberties Union, et al. filed. (D).
Feb. 17, 1983	Brief, amicus curiae, for The New York Criminal Bar Association filed. (D).
FEb. 22, 1983	The motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument is GRANTED and fifteen additional minutes are allotted for that purpose. Respondents are allotted also and additional fifteen minutes for oral argument. The motion of Florida for leave to participate in oral argument as amicus curiae and for additional time for argument is DENIED. The motion of respondents for divided argument to permit American Bar Association to present oral argument as amicus curiae is DENIED. Brennan and Stevens, JJ., would grant this motion.
Feb. 22, 1983	Reply brief on reargument filed.
Feb. 23, 1983	Motion of the Solicitor General for leave to file reply brief as amicus curiae filed.
Feb. 23, 1983	DISTRIBUTED. 2-25. (Above motion of S. G.).

(Over)

Title

No.

DATE	PROCEEDINGS AND ORDERS
Feb. 24, 1983	Opposition of respondents to motion of the S. G. for leave to file reply brief as amicus curiae filed.
Feb. 28, 1983	The motion of the Solicitor General for leave to file reply brief as amicus curiae is DENIED.
March 1, 1983	ARGUED.